

Mercy, Rehabilitation, and Quid Pro Quo: A Radical Reassessment of Individual Bankruptcy

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Chapter 7 "straight" bankruptcy discharge is a radical policy that has outlived its usefulness. This policy grants most individual debtors complete discharge of indebtedness from their creditors for little more than a filing fee. This article argues that straight bankruptcy should be abolished. In its place, individuals seeking debt relief should be required by statute to participate in a wage assignment plan for a limited period. In support of this argument the article challenges the three rationales for the validity of straight bankruptcy discharge: (1) the creditor-protection or "collection" rationale; (2) the "mercy" rationale; and (3) the "rehabilitation" rationale. When these three rationales are placed in the historical contexts from which they arose, it becomes apparent that the rationales have not kept pace with historical change, especially in light of current economic conditions and other debtor-protection law. Finally, the article examines the validity of mandatory payment plans by considering the necessity and incentive structure of current bankruptcy law. An individual debt relief system that would require all debtors to use whatever future income they might have to fund a payment plan would integrate more smoothly with other debtor-creditor law, respond better to current economic reality, and more effectively address the goals of individual debt relief. Such a regime would also communicate to the public a more acceptable message about debt relief and financial responsibility.

"'How many debtors can pay?' is in part a normative question: the answer depends on moral and social value judgments. . . . Where to draw the line—how much sacrifice to require of people in debt—is a key question in bankruptcy."¹

"When you acquire a Hebrew slave, he shall serve six years; in the seventh year, he shall go free, without payment."²

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¹ TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA 200 (1989).

² Exodus 21:2.

I. INTRODUCTION

Death is not always a terrible thing. Death is the natural and inevitable conclusion of life. It is expected by all sooner or later, and one only hopes that it arrives peacefully at the conclusion of a long, productive, and satisfying existence. So when a commentator recently warned of the impending "Death of Consumer Bankruptcy in the United States,"³ I wondered whether this would be a tragic and untimely death to be mourned bitterly, or a passing to be accepted as the inevitable consequence of natural developments over a long and productive life. This article reports the results of my search for meaning and reason in the life and potential death of individual bankruptcy.⁴ It suggests that the passing of bankruptcy for individuals might reasonably be viewed as neither tragic nor untimely.

The death of consumer bankruptcy would not deprive individual debtors of all relief from overindebtedness: The deceased individual "bankruptcy" would be survived by individual "reorganization."⁵ Current U.S. bankruptcy law offers individuals two avenues of relief from overly burdensome debt.⁶ In "straight

³ Charles Jordan Tabb, *The Death of Consumer Bankruptcy in the United States*, 18 BANKR. DEV. J. 1 (2001).

⁴ I use the term "individual" bankruptcy, rather than "consumer" bankruptcy, to eliminate any distinction between those individuals with business interests and those who are pure "consumers." Gauged by the number of cases filed, bankruptcy in the U.S. today is overwhelmingly about "consumer" individuals without any sort of small business interests. See, e.g., REPORT OF THE COMM. ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. 1, at 64 (1973); DAVID T. STANLEY & MARJORIE GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM 23 (1971); Vern Countryman, *A History of American Bankruptcy Law*, 81 COM. L.J. 226, 231 (1976); Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 363 (1991) (citing DOUGLAS G. BAIRD & THOMAS H. JACKSON, CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY 34 (2d ed. 1990)); Lawrence A. Wiess et al., *An Analysis of State-Wide Variations in Bankruptcy Rates in the United States*, 17 BANKR. DEV. J. 407, 414 (2001).

Business interests may be more implicated in cases filed by individuals than statistics indicate. See John M. Czametzky, *The Individual and Failure: A Theory of the Bankruptcy Discharge*, 32 ARIZ. ST. L.J. 393, 432, 439-40, 443-44 (2000). Nevertheless, I do not believe that bankruptcy policy should be affected by the nature of an individual's debt, particularly considering state business law protections offered specifically to individuals with business liabilities. See *infra* notes 119-24 and accompanying text. Therefore, I use "individual bankruptcy" to mean any bankruptcy case filed by an individual, whether or not business debts are involved.

⁵ See Tabb, *supra* note 3, at 1, 8.

⁶ In fact, three avenues are available to individuals, but only a very few relatively high-net-worth individuals use the reorganization procedures under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1101-1146 (2000). These procedures are generally exceedingly complex and costly, as they were designed for the complex reorganization of large businesses, such as Enron and WorldCom.

bankruptcy” or “liquidation” under Chapter 7 of the Bankruptcy Code,⁷ the debtor receives an immediate, unconditional discharge of debt in exchange for turnover of any non-exempt assets,⁸ the proceeds of which are distributed to creditors. This is the type of relief threatened with extinction. The other form of relief would remain available—discharge of debt conditioned on fulfillment of a payment plan using three to five years of future disposable income under Chapter 13 of the Bankruptcy Code.⁹

The key question, then, is whether forcing debtors to use future income to pay creditors is an unnatural and undesirable development in the historical evolution of bankruptcy relief. I certainly agree that current proposals¹⁰ to institute an expensive, inefficient, and miserly “means test” to deprive people of relief¹¹ are wrong-headed. But this article proposes that some middle ground of requiring payment plans of some type would represent a natural, sensible, and philosophically sound approach to granting debt relief to individuals. Indeed, our adherence to the simple model of immediate and unconditional Chapter 7 “straight bankruptcy” appears to be largely the result of simple inertia. A survey of 150 years of fundamentally important economic and legal developments reveals that much less drastic measures than bankruptcy might better address the legitimate economic and social problems facing individual debtors today. The goal of this article is to challenge us to examine our current bankruptcy system critically with a clearer appreciation of where U.S. bankruptcy policy has been. It assesses whether a regime that made sense under previous legal and economic conditions still makes sense in the radically changed environment of today.

Part II reviews the historical development of the three general categories of rationales most often advanced in support of the policy of allowing individuals to escape their valid obligations. Part III assesses each of the three types of rationales for the individual bankruptcy discharge in historical context. It traces the rapid development in state and federal non-bankruptcy law regulating debtor-creditor relations during the last approximately 150 years, and it concludes that defenses of the bankruptcy discharge have not kept pace with changes in the legal landscape.

Finally, taking into account the conclusions of Part III, Part IV analyzes the notion of forcing all debtors into some sort of payment plan. This Part makes no hard proposals; it simply challenges us to take a hard look at the necessity and incentive structure of current U.S. bankruptcy law. Part IV suggests that an individual debt relief system calling on all debtors to use whatever future income

⁷ 11 U.S.C. §§ 701–728 (2000).

⁸ See *infra* notes 125–28 and accompanying text for a discussion of “exempt” and “non-exempt” assets.

⁹ 11 U.S.C. §§ 1301–1330 (2000).

¹⁰ See H.R. CONF. REP. NO. 107-617, at 5–20 (2002).

¹¹ See Tabb, *supra* note 3, at 12–34.

they might have to fund a payment plan would integrate more smoothly with other debtor-creditor law, respond better to current economic and legal reality, and more effectively adhere to the goals of individual debt relief. Moreover, it proposes that requiring all individuals to attempt to use future income to manage their debts would send a more acceptable message to the public about our policies with respect to financial responsibility and debt relief. Part IV concludes that experience in other countries suggests that payment plans are both expedient and feasible, and the surprisingly simplistic arguments used by Congress to reject such proposals in the U.S. in the recent past simply lack substance.

II. DEVELOPMENT AND DEFENSE OF DISCHARGING THE DEBTS OF INDIVIDUALS

The individual bankruptcy discharge in the United States developed during the economically turbulent nineteenth century in four federal¹² bankruptcy acts. The first U.S. federal bankruptcy act, passed in 1800,¹³ offered debt relief only to traders and merchants,¹⁴ and debtors were not allowed to seek relief themselves—only creditors could initiate “involuntary” bankruptcy cases against such debtors.¹⁵ This law essentially reproduced the restrictive provisions of the English bankruptcy law.¹⁶ Popular discontent led to the repeal of this short-lived act after only three years.¹⁷

In 1841, Congress adopted for the first time in world history¹⁸ a bankruptcy act¹⁹ that allowed individuals—merchants and non-merchants alike—voluntarily

¹² This section—and this article—focus on the development of the discharge in *federal* bankruptcy law. On the development of the short-lived and largely ineffective state debt relief laws, see *infra* notes 106–07 and accompanying text.

¹³ Act of Apr. 4, 1800, ch. 19, 2 Stat. 19, *repealed by* Act of Dec. 19, 1803, ch. 6, 2 Stat. 248.

¹⁴ See F. REGIS NOEL, A HISTORY OF THE BANKRUPTCY CLAUSE OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 124 (1918); CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 13–14 (1935); Tabb, *supra* note 4, at 345–46.

¹⁵ See Tabb, *supra* note 4, at 334–36, 342–43, 346. Warren describes this first act quite explicitly as “purely a creditors’ measure.” WARREN, *supra* note 14, at 13–14; see also Tabb, *supra* note 4, at 370.

¹⁶ See NOEL, *supra* note 14, at 124 (describing the 1800 act as a “faithful transcript of the English statutes”); WARREN, *supra* note 14, at 13–14; Tabb, *supra* note 4, at 345.

¹⁷ Act of Dec. 19, 1803, ch. 6, 2 Stat. 248; see also Tabb, *supra* note 4, at 345.

¹⁸ See WARREN, *supra* note 14, at 60; Morris Weisman, *Story and Webster—And the Bankruptcy Act of 1841*, 46 COM. L.J. 4, 7 (1941). Tabb aptly calls the enactment of the 1841 law “the second watershed event, along with the Statute of 4 Anne [the 1705 English statute that for the first time granted a discharge of debts], in the evolution of the bankruptcy discharge.” Tabb, *supra* note 4, at 349.

¹⁹ Act of Aug. 19, 1841, ch. 9, 5 Stat. 440, *repealed by* Act of Mar. 3, 1843, ch. 82, 5 Stat. 614. The voluntary, non-merchant discharge arose as a result of a twenty-year battle in

to seek discharge of their debts in exchange for a turnover of their valuable property.²⁰ This revolutionary law met the same fate as its predecessor; it was abandoned after only eighteen months²¹ when dissatisfaction mounted against its overly debtor-friendly provisions.²² Nonetheless, when Congress enacted the third²³ and fourth²⁴ national bankruptcy acts in 1867 and 1898,²⁵ it revived (without debate²⁶) provisions allowing all individuals the same opportunity voluntarily to turn over their attachable property²⁷ and seek an immediate and unconditional discharge of their debts.

Congress over the constitutionality and expediency of a federal law freeing individuals from their debts. See WARREN, *supra* note 14, at 27, 45. Indeed, it emerged as a result of "perhaps one of the clearest cases of logrolling or 'political bargain and sale.'" *Id.* at 77; see also PETER J. COLEMAN, *DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607-1900*, at 23 (1974) (explaining the political compromise surrounding the 1841 Act). For an excellent discussion of the history of the 1841 law and the introduction of the voluntary, non-merchant discharge into U.S. bankruptcy law, see John C. McCoid II, *The Origins of Voluntary Bankruptcy*, 5 BANKR. DEV. J. 361 (1988).

²⁰ Property of low value, and a few items "necessary" for the debtor, were exempted from this turnover exchange. See Act of Aug. 19, 1841, ch. 9, § 3, 5 Stat. 442-43 (repealed 1843) (exempting household and kitchen furnishings, the wearing apparel of the debtor and family, and "necessaries" worth up to \$300).

²¹ Act of Mar. 3, 1843, ch. 82, 5 Stat. 614.

²² See, e.g., CLINTON RICE, *MANUAL OF THE U.S. BANKRUPTCY ACT, 1867*, at 393 (Washington, D.C., Philip & Solomons 1867) (reproducing the June 1, 1864, remarks of Thomas Jenckes, Chairman of the Bankrupt Act Committee that prepared the 1867 Act, in which Jenckes explains that "[t]he Bankrupt Act of 1841 was substantially for the benefit of debtors only," and that this problem "was one of the causes, if not the main cause, which induced its sudden repeal"); COLEMAN, *supra* note 19, at 23; Edwin S. Mack, *Bankruptcy Legislation*, 28 AM. L. REV. 1, 4 (1894) ("The first two acts [of 1800 and 1841] were so ill-balanced that each was repealed within three years of its enactment."); Countryman, *supra* note 4, at 229 (citing "creditor dissatisfaction with the number of discharges granted" as a reason for the demise of the 1841 act); Tabb, *supra* note 4, at 353, 370 (calling the 1841 law "pro-debtor").

²³ Act of Mar. 2, 1867, ch. 176, 14 Stat. 517, *repealed by* Act of June 7, 1878, ch. 160, 20 Stat. 99.

²⁴ Act of July 1, 1898, ch. 541, 30 Stat. 544, *repealed and replaced by* Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549.

²⁵ For an insightful comparison of the 1867 and 1898 Acts, see FRANK O. LOVELAND, *A TREATISE ON THE LAW AND PROCEEDINGS IN BANKRUPTCY* § 8 (Cincinnati, W.H. Anderson 1899).

²⁶ See WARREN, *supra* note 14, at 87, 109; see also Charles G. Hallinan, *The "Fresh Start" Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretative Theory*, 21 U. RICH. L. REV. 49, 60 (1986) (noting that the 1898 Act was passed in "an environment in which the modern concept of bankruptcy had already become relatively well established").

²⁷ Like the 1841 law, see *supra* note 20, the 1867 and 1898 laws "exempted" certain of the debtor's property that could not be attached (i.e., seized) by creditors. See Act of Mar. 2, 1867, ch. 176, § 14, 14 Stat. 522-23 (repealed 1878); Act of July 1, 1898, ch. 541, § 6, 30 Stat.

Before the 1898 Act finally introduced a virtually unfettered²⁸ discharge for all individual debtors, however, the discharge was not a simple "ask and ye shall receive" remedy. All three of the previous laws conditioned discharge of debt upon some form of creditor consent²⁹—which one imagines would be unlikely in debtor-initiated cases—or a pay-off by the debtor of a certain percentage of creditors' claims.³⁰ In fact, fewer than one-third of those seeking relief were granted a discharge under the relatively long-lived³¹ 1867 act.³²

No creditor consent or percentage pay-off is required, however, in the current federal bankruptcy law,³³ which represents the fifth iteration of U.S. bankruptcy legislation. Adopted in 1978,³⁴ it carries through the discharge provisions of the

548 (repealed 1978). During the second half of the nineteenth century, state laws insulated more and more property from attachment by creditors, reserving that property to the debtor whether or not the debtor sought bankruptcy relief. *See infra* notes 125–28 and accompanying text.

²⁸ The discharge was "fettered" somewhat by a number of exceptions for certain types of debts that were not dischargeable in bankruptcy, such as debts for taxes, alimony and child support, and for tort liability for willful and malicious injury. *See* Act of July 1, 1898, ch. 541, § 17, 30 Stat. 550–51. This list of "nondischargeable" debts grew steadily during the twentieth century. *See infra* notes 37, 220.

²⁹ Relief under the 1800 Act was conditioned on consent by two-thirds of creditors (and by creditors holding at least two-thirds of the total dollar amount of claims). *See* Act of Apr. 4, 1800, ch. 19, § 36, 2 Stat. 31 (repealed 1803); *see also* Tabb, *supra* note 4, at 347. The creditor-consent requirement was weakened in the 1841 Act, which placed the onus on creditors to "dissent" from the grant of a discharge, although a simple majority in number and dollar value of claims could block the discharge. *See* Act of Aug. 19, 1841, ch. 9, § 4, 5 Stat. 443–44 (repealed 1843); *see also* Tabb, *supra* note 4, at 351–52. In its waning years, the creditor consent requirement was further diluted in 1867, when a majority of creditors were required to assent to a discharge, but only if the debtor was unable to pay fifty percent of creditors' claims. *See* Act of Mar. 2, 1867, ch. 176, § 33, 14 Stat. 533 (repealed 1878); *see also* WARREN, *supra* note 14, at 103–04. Even this ambivalent requirement was suspended for more than a year, and it was ultimately suspended indefinitely as to debts incurred before January 1869, *see* Act of July 14, 1870, ch. 262, § 1, 16 Stat. 276 (repealed 1878), and the percentage of consenting creditors was reduced to twenty-five percent in number and to creditors holding thirty-three percent in value of claims, and only if the debtor was unable to pay thirty percent of creditors' claims, *see* Act of June 22, 1874, ch. 390, § 9, 18 Stat. 180 (repealed 1878). *See generally* WARREN, *supra* note 14, at 120–21; Vern Countryman, *Bankruptcy and the Individual Debtor—And a Modest Proposal to Return to the Seventeenth Century*, 32 CATH. U. L. REV. 809, 815–16 (1983); John C. McCoid II, *Discharge: The Most Important Development in Bankruptcy History*, 70 AM. BANKR. L.J. 163, 181 (1996); Tabb, *supra* note 4, at 356–57.

³⁰ *See* the discussion in the immediately preceding footnote concerning the 1867 Act, requiring creditor consent unless fifty percent—and later thirty percent—of creditors' claims were paid.

³¹ The 1867 Act, with numerous amendments, remained good law for eleven years—almost three times longer than the combined life-spans of its two predecessors.

³² *See* Countryman, *supra* note 4, at 230; Tabb, *supra* note 4, at 357.

³³ 11 U.S.C. §§ 101–1330 (2000).

³⁴ Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549.

1898 Act—the most generous provisions of any law in the world³⁵—for the discharge of the debts of any individual debtor.³⁶ Generally, current U.S. bankruptcy law immediately and unconditionally erases most³⁷ of the debts of individuals upon demand in exchange for little or nothing more than a filing fee.³⁸

From the beginning, legislators and scholars have proposed a variety of rationales for why the law should provide the extraordinary relief of freeing individual debtors from their valid obligations. Such *apologiae* have proliferated because the notion of allowing individuals to escape their obligations is counterintuitive—particularly if debt can be avoided with little or no effort or sacrifice, as under current law. Indeed, the individual bankruptcy discharge undermines the most basic notion underlying our contract law. It flies in the face of the timeless axiom *pacta sunt servanda*, that is, contracts ought to be upheld.³⁹ More than mere rhetoric, this axiom reflects ages-old societal views of the role of contracts⁴⁰—few would subscribe to or support a view that contractual obligations should be optional or conditioned upon the ease with which the contracting parties can carry out their agreements.⁴¹ A legal contractual regime not founded on the notion of *pacta sunt servanda* would scarcely resemble a legal regime at all, as no one could expect—let alone coerce—performance of any given agreement. Therefore, understandably, bankruptcy scholars have labored intensively to develop a compelling explanation for the individual bankruptcy

³⁵ See Tabb, *supra* note 4, at 325.

³⁶ 11 U.S.C. § 727(a)(1) (2000). Non-natural entities can receive a discharge only under a reorganization plan under Chapter 11 of the Bankruptcy Code. 11 U.S.C. §§ 1123, 1129, 1141 (2000).

³⁷ A number of debts are not dischargeable in bankruptcy, including some taxes, alimony and support obligations, and liability for willful and malicious injuries inflicted on another. 11 U.S.C. § 523(a) (2000).

³⁸ See *infra* Part III.A.

³⁹ See BLACK'S LAW DICTIONARY 1109 (6th ed. 1990).

⁴⁰ See, e.g., REPORT OF THE COMM. ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. 1, at 62 (1973) (“[T]he ‘moral obligation’ to pay debts is widely supported.”); Hallinan, *supra* note 26, at 139–40 (“Indeed, it is safe to say that . . . the moral obligation to keep one’s promises is a virtually universal ethical precept.”); see also *id.* at 139 n.340 (collecting authorities); 1 MENACHEM ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES 117–19 (Bernard Auerbach & Melvin J. Sykes, trans., 1994).

⁴¹ In defending the bankruptcy law and the discharge in particular, the commencement speaker at Harvard Law School in 1893 admitted that “[t]here may well be doubts as to the expediency of this element of discharge, for it is a wide divergence from the law’s customary protection of obligations.” Mack, *supra* note 22, at 5. Professor Shuchman obliquely challenges this notion, but he does not go so far as to suggest that society might prefer a regime of optional contracts. Philip Shuchman, *An Attempt at a “Philosophy of Bankruptcy”*, 21 UCLA L. REV. 403 (1973). Indeed, he does not even propose a systematic framework for deciding whether better results are obtained generally from the “optional,” bankruptcy-influenced regime or from the traditional mandatory contract law regime. *Id.*

discharge that can be reconciled with the notion that contractual obligations generally ought to be respected and enforced.

From a review of the most commonly cited rationales,⁴² essentially three salient themes⁴³ emerge.⁴⁴ First, under what we might call the “collection” theme, the prospect of a discharge is supposed to encourage the debtor to cooperate with her creditors to reveal property available to pay debts,⁴⁵ avoid a wasteful multiplicity of collection actions by various creditors,⁴⁶ and provide for generally equal distribution of the debtor’s property among all creditors.⁴⁷ This “creditor protection” rationale for granting a discharge of debt appears to be the oldest.⁴⁸ Indeed, it expresses the *raison d’être* of the first law formally discharging debt, which appeared in English law in the early eighteenth century.⁴⁹

⁴² Given the value- and subjective-judgment-laden nature of the debate, I have made no attempt at an exhaustive analysis of all existing arguments in favor of individual bankruptcy relief. I address here only the most commonly referenced arguments in order to access as broad a perspective as possible given reasonable time and space limitations.

⁴³ Following an insightful observation in a wonderfully helpful piece of scholarship, see MICHAEL J. HERBERT, *UNDERSTANDING BANKRUPTCY* (1995), I use the term “theme” here to stress that these rationales for the discharge contain “ideas, sometimes conflicting ideas, that recur” but that “are never fully synthesized or played out to their logical conclusion.” *Id.* at 2. One of the goals of this article is to try to play out some of the bases underlying these themes “to their logical conclusion” and to critically analyze their content in the context of modern law and society.

⁴⁴ See generally Czarnetzky, *supra* note 4, at 394 n.6, 395–96 (2000) (categorizing the various rationales).

⁴⁵ See, e.g., NOEL, *supra* note 14, at 30; Hallinan, *supra* note 26, at 53–54 (explaining that “[f]or most of its Anglo-American history, bankruptcy was exclusively a creditors’ remedy, a device for equitably dividing an insufficient pool of assets among multiple claimants” which had been “originally conceived . . . as a reward for the debtor’s efforts to maximize the return to his creditors”); Tabb, *supra* note 4, at 329–30 (explaining that bankruptcy law developed in England in the sixteenth century “to give creditors a further collection remedy”).

⁴⁶ See, e.g., John C. Weistart, *The Costs of Bankruptcy*, LAW & CONTEMP. PROBS. Autumn 1977, at 107, 111 (citing the “terminat[ion of] costly collection actions” as a benefit of bankruptcy).

⁴⁷ See, e.g., DOUGLAS G. BAIRD ET AL., *BANKRUPTCY: CASES, PROBLEMS, AND MATERIALS* 20–24, 453–55 (2000).

⁴⁸ While the “mercy” theme reaches back before the advent of the Common Era, until the first discharge law in England in 1705, mercy did not produce the discharge of debts, but rather only the discharge of debtors from slavery and/or imprisonment. See *infra* Part III.B.

⁴⁹ See Douglass G. Boshkoff, *Limited, Conditional, and Suspended Discharges in Anglo-American Bankruptcy Proceedings*, 131 U. PA. L. REV. 69, 105 (1982) (“In England bankruptcy law began as collection law.”); Tabb, *supra* note 4, at 337 (“Certainly the primary purpose of the act [the Statute of 4 Anne, the 1705 English bankruptcy law that for the first time provided for a discharge of debts], was to facilitate creditors’ recoveries.”). Indeed, “the discharge was seen as at best incidental to the principal purpose of a bankruptcy law [i.e., the collection of the debtor’s assets and pro rata distribution to creditors] until the early twentieth century.” Tabb, *supra* note 4, at 329 n.21.

Second, according to what we might call the “mercy” theme, discharging the debtor from a crushing debt burden is simply the morally just reaction to the suffering of honest but unfortunate people. Morality⁵⁰ and basic humanity⁵¹ call for the law to show compassion⁵² and provide mercy⁵³ to the pointlessly suffering debtor. This notion reaches back to the very beginnings of western civilization, with evidence of such “merciful” debt relief norms in ancient Hebrew and Roman law.⁵⁴

Third, under what we might call the “rehabilitation” theme, the discharge lifts an overwhelming burden from the debtor’s shoulders and allows her to return to active participation in commercial society.⁵⁵ It reinvigorates the debtor’s

⁵⁰ See Richard E. Flint, *Bankruptcy Policy: Toward a Moral Justification for Financial Rehabilitation of the Consumer Debtor*, 48 WASH. & LEE L. REV. 515, 519–20 (1991) (setting out the purpose of the paper “to suggest that the central justification for the debtor financial relief provisions of the Bankruptcy Code is founded in the natural law theory of morality”); Veryl Victoria Miles, *Assessing Modern Bankruptcy Law: An Example of Justice*, 36 SANTA CLARA L. REV. 1025, 1028 (1996) (assessing modern bankruptcy law through the lens of “Catholic social justice” and the “moral virtues of mercy and charity”). *Id.*

⁵¹ See NOEL, *supra* note 14, at 200 (“The history of these [bankruptcy] laws is evidence of man’s humanity to his fellow man.”); WARREN, *supra* note 14, at 80 (explaining the view of Henry Clay, a proponent of the 1841 Act, that the bill was supported by, among other things, “all considerations of justice, humanity, and benevolence”); S. Whitney Dunscomb, Jr., *Bankruptcy: A Study in Comparative Legislation*, in 2 STUDIES IN HISTORY, ECONOMICS AND PUBLIC LAW 151 (1893) (arguing that the discharge of debt is supported in part by “humanity”); Flint, *supra* note 50, at 536 (explaining the debt relief provisions in bankruptcy law as a “congressional recognition [of the] intrinsic value of human dignity”).

⁵² See, e.g., Flint, *supra* note 50, at 554 (“Thus, the underlying goal of the consumer bankruptcy process has evolved from retaliation, to compensation, and now to compassion and concern for those less fortunate in our society.”).

⁵³ See Stephen W. Sather et al., *Shakespeare for Lawyers—“The Quality of Mercy”*, AM. BANKR. INST. J., July/Aug. 1995, at 10, 25, available at 1995 ABI JNL. LEXIS 87, at *7 (“Structurally, a bankruptcy court is a court that gives out second chances, that is, dispenses mercy.”).

⁵⁴ See *infra* Part III.B.

⁵⁵ One of the best, in my view, and most coherent statements of this theme appears in Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047 (1987). Professor Howard argues that the discharge is necessary to “restore the debtor to economic productivity and viable participation in the open credit economy” by “lifting the burden of impossible debt.” *Id.* at 1069. As Professor Howard notes, the “rehabilitation” theme in the context of the “open credit economy” figured prominently in the report submitted to Congress in 1973 by the commission convened to examine bankruptcy law reform. *Id.* at 1062; see also REPORT OF THE COMM. ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. 1, at 68–74 (1973). The Commission explained that one important function of the discharge for individuals is to “rehabilitate debtors for continued and more value-productive participation.” *Id.* at 71. Indeed, the “rehabilitation” theme achieved a “virtually complete . . . triumph” when the new Bankruptcy Code was enacted in 1978. See Hallinan, *supra* note 26, at 86; see also *id.* at 62–63 (noting that the “[m]ost apparent” aspect of the new “fresh start” policy

economic incentives and efforts, which had been crippled by a crushing debt burden.⁵⁶ After all, the argument goes, if every dollar earned is destined for seizure by insatiable creditors, what reason has any debtor to be an active member of economic society.⁵⁷ Similarly, the discharge provides a liability safety valve to encourage entrepreneurial individuals to take commercial risks for the benefit of society.⁵⁸

III. CRITICAL EXAMINATION OF THE THEMES OF DISCHARGE RATIONALIZATION IN HISTORICAL CONTEXT

This part argues that the three themes of defending the bankruptcy discharge described above have lost much of their persuasive force over the past 150 years. As U.S. bankruptcy legislation was evolving, so too were other state and federal laws protecting individual debtors from the advances of their creditors. Substantial legal innovations have rendered bankruptcy relief a much less pressing necessity for most financially overextended individuals. Solid foundations still support offering debt relief to individuals, but that support is

under the 1898 Act was a continuing reliance on the “rehabilitation” theme, both in the shape of the 1898 Act itself and in early judicial decisions applying it).

⁵⁶ See F. Regis Noel, for example, in *A History of the Bankruptcy Clause of the Constitution of the United States of America*, stating:

[S]ociety must be seriously injured by the presence of unproductive or discontented members, who through idleness or vicious habits may eventually become public charges. . . . [P]ublic policy makes it expedient that insolvent debtors . . . shall be given a fresh start in life under the benevolent influence of the ordinary incentives to industry and enterprise.

NOEL, *supra* note 14, at 187; H.R. REP. NO. 55-65, at 30-31 (1897) (describing “an army of men crippled financially” who would benefit from a “bankruptcy law that will lift these terrible and hopeless burdens, and restore to the business and commercial circles of the country the active and aggressive elements . . . that are now practically disabled for the battle of life”).

⁵⁷ For example, Professor Jackson explains that, without a discharge, the hopelessly overextended debtor might “devote more of his energies and resources to leisure, a consumption item that his creditors cannot reach” which “decreases [the debtor’s] productive contributions to society.” Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1420 (1985); see also Mack, *supra* note 22, at 5 (defending the discharge with the “chief justification” that those whose “earnings are entirely at [their] creditor’s mercy” would have little incentive to work). Incidentally, Jackson’s second hypothesis supporting the bankruptcy discharge can be categorized under a “preemptive” rehabilitation theme: He suggests that the nonwaivable discharge provides a disincentive to extension of credit and, ultimately, a safety net for the chronic and systematic consumer bias in favor of current consumption. Jackson, *supra*, at 1405-11; see also Hallinan, *supra* note 26, at 113-16.

⁵⁸ See Czarnetzky, *supra* note 4, at 405-15; Hallinan, *supra* note 26, at 64 (“[T]he encouragement of commercial risk taking was thus established as the chief organizing principle of the bankruptcy ‘fresh start’ policy.”); Tabb, *supra* note 4, at 335.

perhaps not nearly as steadfast as the tenor of recent bankruptcy reform debate might suggest.

Each of the subparts of this part examines one of the three individual discharge rationales described above. Part III.A quickly disposes of the “collection” theme as having little or no relevance for individual bankruptcy, as individual debtors generally own nothing legally available for collection and distribution to creditors. Part III.B reveals that the “mercy” theme is largely a relic of dark times long past. It generally relies on out-of-context references to a time when debtors’ personal liberty and integrity were literally at the mercy of their creditors. Today, mercy-based arguments have some persuasive force, but they are much less compelling in light of modern debt collection restrictions and legal protections for debtors’ personal liberty. Finally, Part III.C suggests that the “rehabilitation” theme is also often overstated given modern laws shielding the assets and income of debtors. Nonetheless, the rehabilitation theme retains some important substance today, although primarily because Congress has refused to take simple, decisive action to protect debtors’ wages from rapacious garnishment by creditors.

A. The “Collection” Theme

The “collection” theme applies in only the most limited way to individual bankruptcy. The discovery, collection, and fair distribution of the debtor’s assets have little significance in this context: For as long as any living person can remember, the overwhelming majority of bankruptcy cases initiated by individual debtors have produced no assets for equal distribution among creditors.⁵⁹

⁵⁹ Such cases are called “no-asset” bankruptcies, and they have been the norm in individual cases for all of recent history—and most likely before then, as well. *See, e.g.*, COLEMAN, *supra* note 19, at 23 (noting that, under the 1841 Act, creditors received only ten cents on the dollar in distributions); STANLEY & GIRTH, *supra* note 4, at 4, 20–21 (explaining that, between 1946 and 1969, over seventy percent of cases were “no-asset” cases); WARREN, *supra* note 14, at 81, 112–13 (noting that “very small dividends were paid to the creditors” under the 1841 Act, and the 1867 Act “almost from the outset proved a failure and unpopular everywhere,” as creditors generally received no distributions); Countryman, *supra* note 4, at 231–32 (noting that, since 1964, of the “vast majority” of cases, seventy percent were “no asset” cases, another fifteen percent were “nominal asset” cases, and in the less than fifteen percent of “asset” cases, average returns to general unsecured creditors were only seven to eight percent); Mitchell S. Dvoret, *Federal Legislation Bankruptcy Under the Chandler Act: Background*, 27 GEO. L.J. 194, 197 (1938) (noting that average distributions to general unsecured creditors during the decade preceding 1932 averaged between 5.1% and 7.7% of the amounts due them); Hallinan, *supra* note 26, at 50–51 n.2 (noting that the percentage of “no-asset” cases has grown to ninety-seven percent since 1978); Robert D. Martin, *A Riposte to Klee*, 71 AM. BANKR. L.J. 453, 456 n.14 (1997) (citing unpublished 1997 official statistics showing that “no-asset” cases constituted ninety-five percent of all Chapter 7 cases); Tabb, *supra* note 4, at 353 (noting that creditors “sought to repeal the law almost immediately after its passage” since “[v]ery small dividends were paid, and administrative expenses were high”);

Particularly in "consumer" cases, involving no potential small business assets, the goals of asset collection and equality of distribution among creditors are all but irrelevant. The predominant purpose—if not the sole purpose—of individual bankruptcy today is to effect the discharge of debts—to give the debtor a "fresh start."⁶⁰ Thus, the "mercy" and "rehabilitation" themes are left to explain why this "fresh start" for individuals is so jealously guarded in U.S. bankruptcy law.⁶¹

B. The "Mercy" Theme

Until very recently, the only "mercy" envisioned in debt relief law was similar to the "mercy" explored in Shakespeare's "The Merchant of Venice"—restraining creditors' bloodthirsty desire for bodily torture and physical confinement of their debtors.⁶² The concept of discharging the debts of individuals developed just as mercy-based arguments were losing most of their foundation. This trend culminated at the turn of the twentieth century with the

Michelle J. White, *Personal Bankruptcy Under the 1978 Bankruptcy Code: An Economic Analysis*, 63 IND. L.J. 1, 38 (1987) (showing a return to unsecured creditors in only three percent of Chapter 7 liquidation cases in the late 1970s and early 1980s). Note that the debtors in both "no asset" and "nominal asset" cases are not penniless—exemptions allow them to shield from their creditors and retain a certain amount of property (perhaps a substantial amount) even after bankruptcy. See *infra* notes 125–28 and accompanying text.

⁶⁰ A telling example of this appeared in a Spring 1994 roundtable discussion of consumer bankruptcy among several bankruptcy judges, academics, and practitioners. See Arthur B. Briskman et al., *Consumer Bankruptcy: A Roundtable Discussion*, 2 AM. BANKR. INST. L. REV. 5 (1994). One of the panel members questioned the necessity and, indeed, the utility of bankruptcy for "judgment-proof" debtors. *Id.* at 29–30. See generally *infra* notes 129–30 (describing the notion of "judgment proof"). In response to the ultimate question why such people need the expense, stigma, and financial consequences of bankruptcy relief despite the fact that creditors have no practical remedy against such people's property, the glib answer given by one of the judges was "[d]ischarge." *Id.* at 30; see, e.g., Boshkoff, *supra* note 49, at 103 ("In the United States . . . debtor rehabilitation is a paramount concern."); Flint, *supra* note 50, at 529 ("The soul of debtor financial relief, the fresh start, is found in the availability of a discharge and in the protection of exempt property."); Tabb, *supra*, note 4, at 365 (noting the comment of one bankruptcy referee shortly after the enactment of the 1898 Act, suggesting that "[t]he principal object of the law appears to be to make discharges easy, inexpensive and certain"). Indeed, one commentator has quite candidly explained that the purpose of bankruptcy is to "redistribute income from creditors to debtors"—a positive thing, in his view, as it "enables individuals to maintain a middle-class standard of living that would not be enjoyed by most workers if they opted to live within their means." Steven H. Kropp, *The Safety Valve Status of Consumer Bankruptcy Law: The Decline of Unions as a Partial Explanation for the Dramatic Increase in Consumer Bankruptcies*, 7 VA. J. SOC. POL'Y & L. 1, 4 (1999).

⁶¹ See, e.g., Hallinan, *supra* note 26, at 57 (identifying "essentially two styles of explanation" for modern bankruptcy laws, which correspond with the "mercy" and "rehabilitation" themes).

⁶² See Sather et al., *supra* note 53, at 1.

abolition of the two elements that gave rise to the mercy theme: slavery and debtor's prison.

Express or tacit exhortations to mercy in bankruptcy commonly invoke one of the oldest and most persuasive sources of directives on mercy: the first five books of the Bible.⁶³ The Lord's admonitions to the ancient Hebrews to show mercy to their fellow indebted tribesmen provide powerful rhetorical support for modern "mercy" rationales for the relief of the hopelessly indebted. Using biblical references to support modern debt relief law, however, exemplifies how modern rhetoric has divorced "rules" from their historical context in a way that distorts their original meaning.

The various statements on debt relief in the Torah⁶⁴ are contradictory, and only one element remains constant: Biblical commandments focus on releasing debt slaves, not discharging debts. The first, oldest,⁶⁵ and most clearly "rule-oriented,"⁶⁶ Biblical pronouncement on debt relief appears in *Exodus* 21:2 to 21:11, of which the first verse is the most often cited: "When you acquire a Hebrew⁶⁷ slave, he shall serve six years; in the seventh year, he shall go free,

⁶³ See, e.g., *Consumer Bankruptcy in the Balance: Providing an Effective Safety Net for Overwhelmed Families—Testimony of the National Consumer Law Center Before the Comm. on Banking, Hous., & Urban Affairs Subcomm. on Fin. Inst. & Regulatory Relief*, 52 CONSUMER FIN. L.Q. 185, 187 (1998) [hereinafter *Consumer Bankruptcy Testimony*]. One of my personal favorite examples of Bible citation in modern bankruptcy discussion is the citation to *Exodus* 21:2 and *Deuteronomy* 15:2 following the table of contents in MELVIN J. KAPLAN, *HOW TO GET YOUR CREDITORS OFF YOUR BACK WITHOUT LOSING YOUR SHIRT* (1979).

⁶⁴ The Torah is often also referred to as the "Pentateuch" (from the Greek for "five-volumed work"), as it comprises the first five books of the Judeo-Christian Bible. See THE OXFORD COMPANION TO THE BIBLE 579 (Bruce M. Metzger & Michael D. Coogan eds., 1993) [hereinafter OXFORD BIBLE COMPANION].

⁶⁵ See Paul B. Rasor, *Biblical Roots of Modern Consumer Credit Law*, 10 J.L. & RELIGION 157, 159 (1994).

⁶⁶ The "casuistic" rules set out in the "Covenant Code," *Exodus* 20:23–23:19, are recognized as "rules" comprising part of ancient Hebrew law with worldly consequences; indeed, the main body of these rules is introduced in *Exodus* 21:1 as "*mishpatim*," translated as "the rules" or "the ordinances," and having a distinct legal connotation. See THE TORAH: A MODERN COMMENTARY 566 (W. Gunther Plaut ed., 1981) [hereinafter TORAH COMMENTARY]. Most Scholars believe that the "apodictic" exhortations in the later "Deuteronomic Code," *Deuteronomy* chs. 12–26, in contrast, carried no earthly penalty and were not enforced as rules in ancient Hebrew law. Rather, the "preaching" one finds in *Deuteronomy* represents reminders of moral commandments and humanitarian imperatives—impassioned pleas to a people who had begun to stray from the ideal of piety and community that had existed during the early days of formation of Israel many years earlier. See, e.g., LAWRENCE BOADT, *READING THE OLD TESTAMENT: AN INTRODUCTION* 347–48 (1984); OXFORD BIBLE COMPANION, *supra* note 64, at 164; Rasor, *supra* note 65, at 161–64.

⁶⁷ The focus on "*eved ivri*"—"Hebrew slave"—reminds us that this rule was designed for a relatively small community to protect only those who belonged to one of the tribes of Israel—only to "insiders." It probably also suggests that lending occurred only within the tribe to people whom the lenders knew personally (or whose relatives the lenders knew)—which makes the

without payment."⁶⁸ *Exodus* says nothing at all about forgiving debts. It only demands release of slaves—most likely debt slaves⁶⁹—after six years of service.

Release of debt slaves appears as an element of another often-cited tradition in *Leviticus*—the Jubilee. Every fiftieth year was to be hallowed as a "jubilee," in which the Hebrews were to "proclaim release throughout the land for all of its inhabitants,"⁷⁰ which included a release of "insider" debt slaves: "If your brother⁷¹ under you continues in straits and must give himself over to you . . . [h]e shall remain under you as a hired or bound laborer; he shall serve with you only until the jubilee year. Then he and his children with him shall be free of your authority."⁷² Once again, *Leviticus* makes no mention of debt forgiveness, and it requires potentially a lifetime of debt servitude.

Only *Deuteronomy* adds an element of debt relief to freedom from slavery, and it does so in a curious and dubious way. The commandment from *Exodus* regarding the seventh-year release of debt slaves appears again in *Deuteronomy* in very similar terms: "If a fellow Hebrew⁷³ . . . is sold to you, he shall serve you six years, and in the seventh year you shall set him free."⁷⁴ To this, however, *Deuteronomy* adds debt relief: "Every seventh year you shall practice the remission of debts. . . . You may [collect from] a foreigner, but you must remit whatever is due you from your kinsmen."⁷⁵ The curious part of *Deuteronomy's*

notion of extensive debt slavery within such a community all the more striking, even if "what we would call consumer lending, was quite common in ancient Israel." See Rasor, *supra* note 65, at 167.

⁶⁸ *Exodus* 21:2 (Jewish Pub'n Soc'y trans., 1967).

⁶⁹ As opposed to foreign slaves, who might have been acquired in wars with other tribes, Hebrew slaves most likely found themselves in that position because they had sold themselves (or been sold) into servitude for the satisfaction of a debt. See TORAH COMMENTARY, *supra* note 66, at 942; OXFORD BIBLE COMPANION, *supra* note 64, at 700 (describing three categories of slaves in ancient Israel, and limiting the category of "non-Israelites" to those captured or purchased—not debt slaves).

⁷⁰ *Leviticus* 25:8–10 (Jewish Pub'n Soc'y trans., 1967).

⁷¹ Note again that only Hebrews—members of the tribe of Israel—were entitled to relief. See *supra* note 67; *infra* note 73.

⁷² *Leviticus* 25:39–41, :47 (Jewish Pub'n Soc'y trans., 1967). The same rule applied whether the master-creditor was a Hebrew or a foreigner. See *id.* at 25:54.

⁷³ Note once again the consistent discrimination against non-tribe members. *Leviticus* explains this discrimination by distinguishing foreigners, who did not serve the Lord, from the Hebrews, who served the Lord and, therefore, should not be enslaved to any other master. See TORAH COMMENTARY, *supra* note 66, at 942; *Leviticus* 25:42–45 ("For they are My servants, whom I freed from the land of Egypt . . . [I]t is [only] from the nations round about you that you may acquire male and female slaves. You may also buy them from among the children of [foreigners] resident with you . . ."). It also seems likely that the Hebrews did not lend to non-Hebrews, so remission of debts from foreigners was simply not an issue. See OXFORD BIBLE COMPANION, *supra* note 64, at 700.

⁷⁴ *Deuteronomy* 15:12 (Jewish Pub'n Soc'y trans., 1967).

⁷⁵ *Id.* at 15:1, :3.

Sabbatical Year⁷⁶ debt relief admonition appears as an afterthought: *Deuteronomy* goes beyond simple debt relief and urges the master/creditor not to allow his newly freed debt slave to go empty-handed, but to offer him livestock, grain, oil, and wine—after all, the passage explains, the master escaped from slavery himself in Egypt only by the grace of the Lord.⁷⁷ This utopian exhortation to “brotherly love” leaves one with the distinct impression that it did not represent a legal norm,⁷⁸ and possibly not even a binding moral imperative.

Thus, one immediate conclusion from a review of Biblical references to “debt relief” is that only one mentions remission of debt—but each calls for emancipation of debt slaves. Release from debt slavery is the only consistent element of biblical debt relief, and only members of an insular tribal collective could hope for this limited benefit. Ancient Bible references bear little if any relevance to modern law for the remission of debt,⁷⁹ especially to the sort of liberal, virtually cost-free relief offered by U.S. law.

In addition, two other significant points—one obvious, one non-obvious—are consistently overlooked when these three sets of verses are cited in support of the “mercy” theme. First, even the most generous rule in *Deuteronomy* required a significant period of servitude—as long as six years—before the debtor could regain his freedom.⁸⁰ It is quite understandable that the law would demand mercy for someone who had given up a significant portion of his life in debt slavery. Moreover, the value of six years of labor and probably at least one-tenth of one’s lifetime could quite reasonably be viewed as sufficient substitute for virtually any

⁷⁶ The special significance of the seventh-year was developed in *Leviticus*. Along with the fiftieth-year Jubilee, *Leviticus* described the seventh-year “Sabbatical Year,” during which the Earth was to have a complete rest; no crops could be planted, no vineyards could be pruned, no harvest could be gathered except to feed the members of the landowner’s household (including slaves and livestock). *Leviticus* 25:2–7; see also Rasor, *supra* note 65, at 184–85. In *Leviticus*, however, the Sabbatical Year contained no element of debt relief at all.

⁷⁷ *Deuteronomy* 15:13–15 (Jewish Pub’n Soc’y trans., 1967).

⁷⁸ See *infra* notes 83–84 and accompanying text.

⁷⁹ Of course, the Christian New Testament, especially the Lord’s Prayer, asking the Lord to “forgive us our debts as we forgive our debtors,” comes much closer to being relevant to modern debt relief law. See *Matthew* 6:12. However, citations to the New Testament are rare in bankruptcy debate, and the context in passages like the Lord’s Prayer is clearly more figurative and poetic than descriptive or imperative.

⁸⁰ Certainly, if the Sabbatical rule were applied as it is described in *Deuteronomy*, those debtors lucky or shrewd enough to take on obligations on the eve of the Sabbatical could expect immediate discharge of their debts. Some scholars have avoided this problem by suggesting that *Deuteronomy* intended only a Sabbatical Year moratorium, with the debt becoming due again in the eighth year. See TORAH COMMENTARY, *supra* note 66, at 1741 n.1. This interpretation is inconsistent with Jewish tradition (and difficult to square with the text), but in either event, it is doubtful that the Sabbatical rule actually effected in practice the discharge of debts. See *infra* notes 83–84 and accompanying text.

debt.⁸¹ The Bible's debt relief provisions do not implicate the simple situation of debtors forced to make difficult choices about budgeting and making ends meet. The Biblical debt relief laws are inextricably tied to fundamental physical liberty—and they exact a significant investment of labor for the debtor's freedom.

Second, both the Sabbatical Year remission of debt (mentioned only in *Deuteronomy*) and the "general release" of the Jubilee year (in *Leviticus* and *Deuteronomy*) were most likely apocryphal. Most scholars generally agree that the fiftieth-year Jubilee was "purely utopian" and was never applied.⁸² Similarly, it is uncertain whether the Sabbatical Year forgiveness of debt was actually enforced even in the earliest days, but it ultimately "did not work out in practice," in part due to "loopholes" in the later rabbinical interpretation of the law.⁸³ Moreover, whether or not the Sabbatical debt release failed in practice, it was all but abolished "legislatively" by Rabbi Hillel shortly before the advent of the Common Era.⁸⁴ Thus, the "mercy" represented in biblical passages was much more limited—in both extent and time—than modern references suggest. To the extent that the merciful Hebrew debt relief laws were ever applied at all, they offered only freedom from debt slavery, and even then only after six years of forced labor.

The first clear legal ancestor of modern "merciful" debt relief developed in the Roman Empire, but it, too, was confined to clemency from slavery, prison, and worse. The practice of *cessio bonorum* introduced into Roman law at the advent of the Common Era⁸⁵ the notion upon which modern bankruptcy law is

⁸¹ See, e.g., *Deuteronomy* 15:18 (encouraging the master who has freed his debt slave not to "feel aggrieved," as the six years of forced labor was likely worth twice that of a hired hand); Rasor, *supra* note 65, at 185.

⁸² See, e.g., TORAH COMMENTARY, *supra* note 66, at 942–43; Rasor, *supra* note 65, at 185 n.177.

⁸³ TORAH COMMENTARY, *supra* note 66, at 941, 1440. Perhaps the primary reason the release did not work in practice is that it did not apply to debts owed to courts, so creditors developed the practice of transferring their debts to courts as their appointed agents, thereby avoiding the release altogether. See JOSEPH TELUSHKIN, JEWISH LITERACY 121 (1991).

⁸⁴ See 2 MENACHEM ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES 511–13 (Bernard Auerbach & Melvin J. Sykes trans., 1994). Hillel, the greatest rabbi of the first century B.C.E., saw that lenders were refusing to lend before an impending Sabbatical release, knowing that their debts would be wiped out; therefore, he decreed that, if the debt was memorialized in a so-called *prosbul* (a simple form signed by the lender and a judge or witness), the debt would not be released in the Sabbatical Year. *Id.* at 512; TELUSHKIN, *supra* note 83, at 120–21.

⁸⁵ The timing and authorship of the law instituting the *cessio bonorum* are in dispute, with some attributing it to Julius Caesar, others to Augustus Caesar. See, e.g., WILLIAM A. HUNTER, A SYSTEMATIC AND HISTORICAL EXPOSITION OF ROMAN LAW 879–80 (1876); JOHN CROOK, LAW AND LIFE OF ROME 174–75 (1967); H.F. JOLOWICZ & BARRY NICHOLAS, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 217–18 & n.3 (1972). See generally LUCIEN GUENOUN, LA CESSIO BONORUM (1913). The notion of *cessio bonorum* is also reflected in the *Lex Poetalia* three centuries earlier, as well as in Gaius's and Justinian's works in the first and

still based: A debtor could obtain debt relief by swearing insolvency and ceding all of his property to his creditors.⁸⁶ This embodiment of the “first purely charitable treatment of debtors,”⁸⁷ however, only allowed the debtor to avoid prison and corporal punishment—it did not discharge debt.⁸⁸ Here again, as in ancient Israel, Roman mercy was limited to securing release from debt slavery or prison (or perhaps, indeed, avoiding a far more gruesome fate⁸⁹).

In Europe until the late nineteenth century, “mercy” continued to mean only discharge from jail and avoidance of public execution.⁹⁰ In the continental civil law systems, the descendant of the Roman *cessio bonorum* offered debtors the only sure relief from the advances of their creditors,⁹¹ and some European states

sixth centuries of the Common Era. See G. INST. 3.78; J. INST. 4.6.40; see also NOEL, *supra* note 14, at 17.

⁸⁶ LOVELAND, *supra* note 25, at 2; NOEL, *supra* note 14, at 17.

⁸⁷ NOEL, *supra* note 14, at 19.

⁸⁸ LOVELAND, *supra* note 25, at 2; NOEL, *supra* note 14, at 17–19; Countryman, *supra* note 4, at 226.

⁸⁹ Early bankruptcy histories invariably recall the “execrable atrocity of the early Roman laws with respect to bankruptcy.” JACOB B. MOORE, *THE LAWS OF TRADE IN THE UNITED STATES*, at vii (New York, Alexander V. Blake 1840). Roman law that predated both Julius Caesar and the Corpus Juris Civilis by centuries provided for the division of the (executed) body of the debtor (or at least the proceeds from the debtor’s sale into slavery outside Rome) among his creditors. See, e.g., *id.*; THEODORE M. BECKMAN & ROBERT BARTELS, *CREDITS AND COLLECTIONS IN THEORY AND PRACTICE* 685 (1949); NOEL, *supra* note 14, at 16; Countryman, *supra* note 4, at 226. It is doubtful, however, that these vicious laws were ever in fact enforced. See NOEL, *supra* note 14, at 17; Richard Ford, *Imprisonment for Debt*, 25 MICH. L. REV. 24, 25 (1926).

⁹⁰ Although developing “bankruptcy” law provided a discharge of debts at the beginning of the eighteenth century in England and later in America, see *supra* notes 12–27, 48–49 and accompanying text, this law was applicable only to merchants and traders—individuals had to rely on “insolvency” laws, which offered only jail release. See, e.g., *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 194 (1819); CONG. GLOBE APP., 26th Cong., 1st Sess. 483–86, 502, 542–43, 690–91 (1840); NOEL, *supra* note 14, at 83, 96; WARREN, *supra* note 14, at 7; Dunscomb, *supra* note 51, at 156, 161. To be sure, individuals could also rely on the good will of their creditors, either to forbear on the collection of debt, or to agree to some sort of formal or informal collective arrangement, but the law offered the debtor no coercive relief mechanism.

⁹¹ See DAVID A. BOTWINIK & KENNETH W. WEINRIB, *EUROPEAN BANKRUPTCY LAWS* 21, 29, 61, 80, 89, 96, 124 (2d ed. 1986) (describing the bankruptcy laws of various European states, which were subject to a variety of limitations and restrictions and usually did not provide for the discharge of debt); LOVELAND, *supra* note 25, at 2; MOORE, *supra* note 89, at viii; Dunscomb, *supra* note 51, at 15–18; Louis Edward Levinthal, *The Early History of Bankruptcy Law*, 66 U. PA. L. REV. 223, 241–50 (1918); Christoph G. Paulus, *The New German Insolvency Code*, 33 TEX. INT’L L.J. 141, 143 (1998). In fact, continental Europe really began to deal with the problem of consumer over-indebtedness only in the past decade. Little has been written in English about the recent development of European consumer debt relief systems, but one can get a general idea from the following: *Id.* at 153–54; Johanna Niemi-Kiesiläinen, *Changing Directions in Consumer Bankruptcy Law and Practice in Europe and USA*, 20 J. CONSUMER

withheld even the hope of freedom from debtors' prison.⁹² Likewise in England, until the early nineteenth century, "bankrupts were still liable to be imprisoned and forgotten."⁹³ Laws to provide jail release along the lines of the *cessio bonorum* began to appear in England only in the mid-seventeenth century, but they allowed creditors to keep their debtors imprisoned—despite the debtor's cession of all property and oath of insolvency—simply by paying for the debtor's maintenance in jail.⁹⁴ Only in 1813 was the Court for Relief of Insolvent Debtors created in England, but it offered only freedom from involuntary confinement—not a discharge of personal debt.⁹⁵

The American colonists brought with them the English tradition of imprisonment for debt.⁹⁶ The deplorable conditions in American debtors' prisons,⁹⁷ the "defenseless and dependent" debtors most liable to end up

POL'Y 133 (1997); and Nick Huls, *American Influences on European Consumer Bankruptcy Law*, 15 J. CONSUMER POL'Y 125 (1992). See also *infra* notes 182–86 and accompanying text.

⁹² See, e.g., LOVELAND, *supra* note 25, at 2.

⁹³ JULIAN HOPBIT, *RISK & FAILURE IN ENGLISH BUSINESS 1700–1800*, at 22 (1987). Although imprisonment for debt disappeared for a time in the early common law, it was reinstituted in the thirteenth century. See, e.g., Jay Cohen, *The History of Imprisonment for Debt and Its Relation to the Development of Discharge in Bankruptcy*, 3 J. LEGAL HIST. 153, 154 (1982). An often-cited passage from a mid-seventeenth century English case graphically reveals the English judicial attitude toward debt:

If a man be taken in execution and lie in prison for debt, neither the plaintiff . . . nor the sheriff . . . is bound to find him meat, drink, or clothes; but he must live on his own, or on the charity of others; and if no man will relieve him, let him die in the name of God . . .

Manby v. Scott, 1 Mod. 124, 132, 86 Eng. Rep. 781, 786 (Ex. 1659) (quoted, for example, in Countryman, *supra* note 4, at 227).

⁹⁴ See, e.g., Cohen, *supra* note 93, at 158–59; Countryman, *supra* note 4, at 227. The debts for which people were imprisoned were often so small that benevolent societies secured the mass release of debtors by paying only a few shillings. See *id.*

⁹⁵ Countryman, *supra* note 4, at 228. English consumers became eligible to apply for discharge of debt in bankruptcy only in 1861, although unconditional discharge remained a rarity well into the twentieth century. See Tabb, *supra* note 4, at 353–54. See generally Boshkoff, *supra* note 49, at 72–103 (explaining the system of limited, conditional, and suspended discharges applied in England since 1881, and noting the rarity of unconditional discharges of debt).

⁹⁶ COLEMAN, *supra* note 19, at 249 ("By the end of the seventeenth century the debtors' prison had become an established colonial institution."); Ford, *supra* note 89, at 28. In some colonies, debtors could be imprisoned indefinitely for inability to pay. *Id.* at 74, 182 (discussing Connecticut and South Carolina respectively). The colonists also brought with them debt slavery—then known as indentured servitude or debt peonage—which in some cases could be elected as a substitute for imprisonment for debt. Countryman, *supra* note 29, at 812; COLEMAN, *supra* note 19, at 251.

⁹⁷ See, for example, Noel describing one of the worst debtors' prisons:

The darkness was intense; the cave reeked with filth; vermin abounded; water trickled from the roof and oozed from the sides of the caverns; huge masses of earth were

imprisoned,⁹⁸ and the large number of people incarcerated for debt⁹⁹ made mercy a compelling imperative. Therefore, during the eighteenth century, some¹⁰⁰ of the American colonies enacted “*cessio bonorum*”-type insolvency laws¹⁰¹ that allowed debtors to gain their release from debtor’s prison by ceding their property and/or taking an oath of poverty.¹⁰² These laws never provided completely satisfactory relief, however, as the conditions on and extent of relief varied widely

continually falling off. In the dampness and the filth the clothing of the prisoners became mouldy and rotted away, and their limbs became stiff with rheumatism.

NOEL, *supra* note 14, at 70–72; *see also* COLEMAN, *supra* note 19, at 113, 116, 137, 176, 184–85, 233 (noting that the debtors’ prison in early eighteenth century Georgia was “feared as an institution of deprivation and misery,” and describing the “filthy and neglected” condition of debtors in 1829 in New Jersey jails, as well as prisons in eighteenth century New York, Maryland, and South Carolina, where prisoners were forced to harass passers-by to beg for food, water, blankets, and firewood).

⁹⁸ *See, e.g.*, COLEMAN, *supra* note 19, at 148, 254 (noting that one prisoner spent thirty days in a Pennsylvania debtors’ prison for a debt of two cents and stating that “[t]he poor were the chief victims,” including nursing mothers and aged Revolutionary veterans); Ford, *supra* note 89, at 29, 45–46 (noting that, even into the twentieth century, the “principal victims of the system [of arrest for debt] are the workingmen, to whom arrest and detention for even a few days means loss of their jobs”). In *A History of the Bankruptcy Clause of the Constitution of the United States of America*, F. Regis Noel noted that:

[T]he class most likely to get into debt was the most defenseless and dependent, the great body of servants, of artisans, and of laborers The laborer who fell from a scaffold or lay sick of the fever was sure to be seized the moment he recovered, and be carried to the jail for the bill of a few dollars.

NOEL, *supra* note 14, at 70.

⁹⁹ *See, e.g.*, COLEMAN, *supra* note 19, at 137 (noting that one prison in New Jersey in 1829 held five times as many debtors as criminals); NOEL, *supra* note 14, at 70, 119 (noting that “[t]he crime of debt was the cause of the confinement of more men than any infraction of the law,” and citing an estimate that nearly 75,000 people were jailed annually for debt as late as 1833); WARREN, *supra* note 14, at 22 (describing how demand for a bankruptcy law rose between 1809 and 1812 because “the jails were filled to overflowing with imprisoned debtors”); Ford, *supra* note 89, at 29 (citing an 1830 report estimating 50,000 debtors jailed annually in the mid-Atlantic and Northeastern states, from three to five times as many as those jailed for crime); Weisman, *supra* note 18, at 4 (also citing 75,000 incarcerated annually before 1833).

¹⁰⁰ By the time of the Revolution, four of the thirteen colonies had not enacted any form of debt relief law at all, and six had only sporadically offered relief. COLEMAN, *supra* note 19, at 14. Even after the Revolution, some states refused to extend practical relief to insolvent debtors. For example, Rhode Island’s insolvency law required creditor consent for the release of inmates from debtors’ prison until into the twentieth century, and its few attempts at more meaningful relief were either immediately repealed or extremely limited. *See id.* at 88–92.

¹⁰¹ MOORE, *supra* note 89, at viii.

¹⁰² The fascinating and widely diverse development of colonial and state insolvent relief laws is catalogued in COLEMAN, *supra* note 19, at 37–246.

from colony to colony (and later state to state).¹⁰³ The problem of the diversity of insolvency statutes was exacerbated by external limits on the relief they provided: They shielded debtors only within a particular state and only against the specific creditor who had procured the debtor's confinement.¹⁰⁴ Moreover, even after debtors had turned over their property and sworn to their poverty, in-state creditors could often keep them imprisoned simply by paying jail fees.¹⁰⁵ In the nineteenth century, a few states went so far as to enact provisions not only freeing debtors from prison, but also discharging their debts.¹⁰⁶ Ultimately, state "bankruptcy" relief proved ineffective, however, as constitutional concerns all but emasculated these laws.¹⁰⁷

Mercy arguments made compelling sense in the context of debt slavery and imprisonment, but they had lost virtually all of their original foundation by the beginning of the more "enlightened" twentieth century. All forms of slavery, of course, were abolished in the U.S. with the adoption of the Thirteenth

¹⁰³ Relief generally required a cession of property and/or an oath of insolvency, and it was generally conditioned upon one or more of: (1) the size or nature of the debt; (2) length of residence in the colony; (3) the amount of time spent in debtor's prison; or (4) the debtor's age, sex, or marital status. See COLEMAN, *supra* note 19, at 252–53; MOORE, *supra* note 89, at viii. These variances remained in the insolvent relief laws of the states until into the twentieth century. See, e.g., JAMES P. HOLCOMBE, *THE LAW OF DEBTOR AND CREDITOR IN THE UNITED STATES AND CANADA, ADAPTED TO THE WANTS OF MERCHANTS AND LAWYERS* (New York, D. Appleton 1848) (cataloguing, among other laws, insolvent relief laws); Note, *Present Status of Execution Against the Body of the Judgment Debtor*, 42 IOWA L. REV. 306, 317 (1957).

¹⁰⁴ See, e.g., CONG. GLOBE APP., 26th Cong., 1st Sess. 464, 796–97, 804–06, 836 (1840) (noting that insolvent laws not effective to ward off rearrest in other states); COLEMAN, *supra* note 19, at 253 ("Thus the defaulter could be repeatedly arrested and discharged until he had secured a release against each creditor."); MOORE, *supra* note 89, at ix ("[The debtor] is still a prisoner, confined within the limits of his own state, beyond which, if he passes, he is liable again to be imprisoned on the same debts.").

¹⁰⁵ COLEMAN, *supra* note 19, at 253; MOORE, *supra* note 89, at viii.

¹⁰⁶ Such states included New York (1813), Massachusetts (1838), Connecticut (1853), Maryland (1854), and Vermont (1876). See COLEMAN, *supra* note 19, at 50–51, 72, 78–79, 84–85, 123–24, 172, 184–85. On the Massachusetts law, which heavily influenced the Federal 1841 Act, see I.R. BUTTS, *THE CREDITOR'S & DEBTOR'S ASSISTANT, OR THE MODE OF COLLECTING DEBTS: IN FIVE PARTS* 58–63 (Boston, I.R. butts 1849).

¹⁰⁷ See, e.g., *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 199 (1819) (holding that state discharge laws unconstitutionally impaired contracts to the extent they purported to discharge debts contracted prior to the enactment of the law); *Odgen v. Saunders*, 25 U.S. (12 Wheat.) 213, 368 (1827) (holding that a discharge under the law of one state can have no effect on obligations to creditors who are citizens of another state); see also MOORE, *supra* note 89, at 356 (explaining the decisions); WARREN, *supra* note 14, at 91 (noting that the effect of state debt-relief laws was always partial due to Supreme Court decisions declaring states' attempts to discharge out-of-state debts unconstitutional). Such decisions prompted one late nineteenth century commentator to conclude that "[t]his is equivalent to saying that in many cases a discharge under a State insolvency law is virtually worthless." Dunscomb, *supra* note 51, at 155.

Amendment to the Constitution in 1865. Likewise, imprisonment for debt was gradually restricted¹⁰⁸ and ultimately all but abolished¹⁰⁹ in most¹¹⁰ states in the mid- to late-nineteenth century.¹¹¹ Images of the debtor's prison and its suffering

¹⁰⁸ The process of "phasing-out" debt prison began in 1811, when Massachusetts prohibited imprisonment for debts of less than five dollars, and it generally progressed from prohibiting imprisonment for larger petty debts, to forbidding imprisonment of women, and finally to proscribing imprisonment for certain categories of debt. See COLEMAN, *supra* note 19, at 44, 257. For example, imprisonment was prohibited for debts less than \$5 (Delaware, 1841), \$10 (Massachusetts, 1831), and \$13.33 (New Hampshire, 1818). See *id.* at 44–45, 62, 212. Female debtors could not be imprisoned in Pennsylvania beginning in 1819, North Carolina in 1823, Maryland in 1824, Connecticut in 1826, New York in 1828, Massachusetts and New Hampshire in 1831, Vermont in 1834, and Georgia in 1847. See *id.* at 45, 62, 68, 77–78, 119, 149, 177.

¹⁰⁹ I say "all but" abolished because several states never went beyond the gender and debt-size and type restrictions described in the immediately preceding footnote, and courts and creditors often circumvented the abolition elsewhere. See, e.g., Ford, *supra* note 89, at 24, 32–33, 42–44 & n.107 (reporting in 1926 that "[imprisonment for debt] exists today in many parts of the United States" and that "creditors are making use of it on a comparatively large scale"). While imprisonment for contract debts was abolished virtually everywhere, only a few states abolished debtor's prison without qualification, and states like New Hampshire, Vermont, Connecticut, New Jersey, and North Carolina retained imprisonment for all non-contract (i.e., tort) debts. See, e.g., COLEMAN, *supra* note 19, at 61, 68, 78, 139, 225; WARREN, *supra* note 14, at 52; Countryman, *supra* note 4, at 229; Ford, *supra* note 89, at 33; Henry C. Robinson, *Attachment of the Body upon Civil Process*, 7 YALE L.J. 295 (1897) (explaining that Connecticut still allowed arrest for unpaid tort debts, and describing the "mean and cowardly" way in which one Hartford lawyer used this exception to help his clients collect debts). Indeed, in most states today, one can still be imprisoned for failure to pay child or spousal support obligations, and even for "concealing" assets available for enforcement of contract judgments, as such failure is deemed contempt of the court ordering the support payment or disclosure. See, e.g., DAVID CAPLOVITZ, *CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT* 226 & n.1 (1974) (noting that debtors in Maine and upstate New York are subject to confinement for failure to appear at "supplementary proceedings" to disclose assets, and in 1968 to 1970, two hundred debtors in two Maine counties had spent considerable time in jail for contempt for failing to appear at such hearings); COLEMAN, *supra* note 19, at 256–57; STANLEY & GIRTH, *supra* note 4, at 52 (same, mentioning Maine and Illinois); Ford, *supra* note 89, at 38; Note, *supra* note 103, at 308–09.

¹¹⁰ Rhode Island, for example, entered the twentieth century still allowing imprisonment for all types of debt and offering only an ineffective device for insolvent debtors to seek their release with creditor approval. See COLEMAN, *supra* note 19, at 89–90.

¹¹¹ Complete abolition stretched across five decades, beginning in 1821 (Kentucky), continuing steadily from 1838 to 1842 (Vermont, Ohio, Michigan, New York, Alabama, New Hampshire, Tennessee, Delaware, Connecticut, New Jersey, Pennsylvania), picking up Maryland in 1851, stretching again from 1857 to 1867 (Massachusetts, Georgia, South Carolina, North Carolina), and concluding with Virginia in 1873. See COLEMAN, *supra* note 19, at 44–235, 257 ("By the [1850s] most eastern states had done away with the debtors' prison, and by the [1870s] almost all of the others had followed suit."); WARREN, *supra* note 14, at 52. Several states had written opposition to debt imprisonment into their constitutions before the nineteenth

inmates continued to support the "mercy" theme in national bankruptcy debates throughout the nineteenth century.¹¹² But by the beginning of the twentieth century, with debt slavery and prison all but forgotten, the "mercy" theme all but completely disappeared from academic and legislative bankruptcy debate.¹¹³ Thus, the "rehabilitation" theme remains to bear the lion's share of the burden of defending individual bankruptcy today.

C. The "Rehabilitation" Theme

The "rehabilitation" theme is theoretically quite powerful, as it is unquestionably desirable to ensure productive economic activity by all members of society. Like the "collection" and "mercy" themes, however, the rehabilitation theme has lost much of its substance over the years, especially following the consumer protection movement of the late 1960s and early 1970s. The plaguing practical question is whether modern debtors need to resort to bankruptcy law to seek financial rehabilitation to permit their re-entry into economic society. While limitations in modern debtor-protection law leave significant gaps to be filled by some form of bankruptcy relief, those narrow gaps are perhaps disproportionate to the relief offered by current U.S. individual bankruptcy law.

century, but none enacted enabling legislation until much later. See COLEMAN, *supra* note 19, at 256.

¹¹² See, e.g., H.R. REP. NO. 55-65, at 40 (1897) (reporting that the discharge of debt in the 1898 Bankruptcy Act "is making complete the freedom of being released from imprisonment for debt"); CONG. GLOBE APP., 26th Cong., 1st Sess. 796 (1840) (statement of Sen. Webster) (commenting that debtors were still prisoners because they might be arrested in states that had not abolished debt prison, and lamenting the "crime . . . which cannot escape the justice of God" of imprisoning a debtor in the hope that relatives or friends might pay to "save him from the horrors of a loathsome jail"); CONG. GLOBE APP., 26th Cong., 1st Sess. 837 (1840) (statement of Sen. Smith) ("[W]e hold it to be most palpably unjust and absurd that the citizens of an enlightened Republic should be subjected to imprisonment, or be confined within the limits of a single State . . . when they cannot be justly charged with crime, fraud, or dishonor."); CONG. GLOBE APP., 26th Cong., 1st Sess. 546 (1840) (referring to "the clank of his chain" and "the gloom of his dungeon"); RICE, *supra* note 22, at 400 (quoting Jenckes, the Chairman of the Bankrupt Act Committee, who commented upon the passage of the 1867 Act in the House of Representatives: "Hereafter, if this bill becomes a law, imprisonment for debt, that relic of barbarous ages which still lingers in some of the States, will cease to exist and can never be restored.").

¹¹³ But see Karen Gross, *The Debtor as Modern Day Peon: A Problem of Unconstitutional Conditions*, 65 NOTRE DAME L. REV. 165, 167 (1990). To be sure, there is a clear element of mercy in offering debtors a respite from incessant creditor calls, but this less pressing form of mercy no longer stands at the center of debt relief debate. This is true at least in part because both "reorganization" relief under Chapter 13 and "liquidation" relief under Chapter 7 offer the same opportunity for this kind of mercy.

Debtor rehabilitation has been “[b]y far the more common”¹¹⁴ rationale asserted in defense of individual bankruptcy. Rehabilitation-based rationales for discharge have dominated discussion of individual bankruptcy since the twenty-year debate preceding the introduction of the first discharge in 1841. Especially during the course of abolition of debtor’s prison in the nineteenth century, the rehabilitation theme was linked with the “mercy” theme by equating overindebtedness with slavery¹¹⁵ and imprisonment.¹¹⁶ Indeed, early proponents of a discharge of debts for individuals even argued that the debtor’s plight “compares to disadvantage with that of a slave,” because a slave is generally fed and clothed, while a debtor’s “miserable earnings are always exposed to be snatched from the hands of his children.”¹¹⁷ The thrust of the rehabilitation theme, however, has always been not so much compassion for debtors hopelessly overwhelmed by crushing debt, but rather the loss to society due to such debtors’ lack of incentive to work to earn a living or to acquire property.¹¹⁸

Developments in other areas of the law over the past 150 years, however, have done much to address the problem of incentivizing debtors to remain active, productive members of society. First, the law governing organization of business in this country has undergone radical change to shield individuals from exposure and encourage entrepreneurialism. Before the mid-nineteenth century,

¹¹⁴ Hallinan, *supra* note 26, at 57.

¹¹⁵ See, e.g., 31 ANNALS OF CONG. 901 (1818); 35 ANNALS OF CONG. 507 (1820); 3 CONG. DEB. 203 (1827); CONG. GLOBE APP., 26th Cong., 1st Sess. 796–97, 836 (1840).

¹¹⁶ See, e.g., CONG. GLOBE APP., 26th Cong., 1st Sess. 796 (1840) (statement of Sen. Webster) (“[T]here is, restraint and bondage outside the walls of a jail, as well as in.”); NOEL, *supra* note 14, at 186–87 (“The abolition of imprisonment [for debt] did not remove from the debtors all restraint and bondage.”).

¹¹⁷ 35 ANNALS OF CONG. 507 (1820); see also CONG. GLOBE APP., 26th Cong., 1st Sess. 797 (1840) (statement of Sen. Webster) (“Other slaves have masters, charged with the duty of support and protection; but their masters neither clothe, nor feed, nor shelter—they only bind.”).

¹¹⁸ See, e.g., 31 ANNALS OF CONG. 901 (1818) (statement of Representative Hopkinson) (arguing that the debtor is “lost to all usefulness” because he has “no means to earn a farthing, no inducement to make the attempt”); 31 ANNALS OF CONG. 1023 (1818) (statement of Representative Barbour) (arguing that the debtor feels “no motive to exertion” because he “knows that every cent which he may make will be at the mercy of his creditors”); 3 REG. DEB. 170 (1827) (statement of Sen. Robbins) (arguing that the debtor “has no motive to exertion” because he can only acquire property for his creditors, “and even the bread that is passing to his mouth may be intercepted”); CONG. GLOBE APP., 26th Cong., 1st Sess. 796 (1840) (statement of Sen. Webster) (arguing that debtors’ “power of earning is in truth taken away,” as the debtor is “driven to unworthy shifts and disguises . . . to keep the earnings of the day from the reach of his creditors”); CONG. GLOBE APP., 26th Cong., 1st Sess. 816, 818 (1840) (statement of Sen. Clay) (characterizing the debtor as “[s]tripped of all motives to human exertion, with the incubus of an immovable mass of debt upon him”); CONG. GLOBE APP., 26th Cong., 1st Sess. 836–37 (1840); NOEL, *supra* note 14, at 187 (“earning capacity is taken away”); WARREN, *supra* note 14, at 16–17, 70; F.H. Buckley, *The Debtor as Victim*, 87 CORNELL L. REV. 1078, 1088 (2002).

rehabilitation-based arguments stressed that individual debt relief advanced commercial development by encouraging commercial risk-taking by individual entrepreneurs. Without the option of bankruptcy to ease the burdens of liability for business failures, the argument went, small businesspeople faced tremendous risks and possibly complete ruin if a business venture went sour.

But bankruptcy is no longer the central liability-limiting safety valve in business today. In the mid- to late-nineteenth century, the liability-limiting corporate form devolved from a special and highly restricted emolument from the sovereign into nothing more than a documentary formality.¹¹⁹ By the turn of the century, any entrepreneur could easily avoid business liability by completing and filing relatively simple documents of incorporation. Today, limited liability company ("LLC")¹²⁰ and close corporation¹²¹ laws virtually¹²² eliminate non-consensual liability¹²³ for entrepreneurs of all kinds, including individuals.¹²⁴ Bankruptcy still provides an important backstop for liability to consensual business creditors, however. Certain consensual creditors, usually lenders, often require small individual entrepreneurs to personally guarantee debts taken on by their businesses. This effectively circumvents one aspect of the liability limitations offered by state business law.

Second, even without the protections of LLC and corporate laws, creditors cannot deprive individual debtors of all property and leave them with nothing. The law of every state "exempts" most, and often all, of the average debtor's property from collection actions by general creditors.¹²⁵ Such "exemption" laws

¹¹⁹ See, e.g., DOUGLAS G. BAIRD & THOMAS H. JACKSON, CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY 34 (2d ed. 1990); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 166-75 (1973); WILLIAM A. KLEIN & JOHN C. COFFEE, JR., BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES 114-15 (7th ed. 2000).

¹²⁰ See, e.g., DAVID G. EPSTEIN ET AL., BUSINESS STRUCTURES 787-813 (2002).

¹²¹ See, e.g., FRANKLIN A. GEVURTZ, CORPORATION LAW §§ 5.1-5.3 (2000).

¹²² I say "virtually" because corporate liability limitations can be lost—and liability passed through to the entrepreneur—under certain very limited circumstances if a court can be convinced to "pierce the corporate veil." See, e.g., ARTHUR R. PINTO & DOUGLAS M. BRANSON, UNDERSTANDING CORPORATE LAW § 3.03 (1999). The widespread availability of insurance, however, seems to me to offer a complete response to any who would argue that bankruptcy is necessary to deal with non-consensual business liability.

¹²³ By "non-consensual liability," I mean tort and other non-contractual liability.

¹²⁴ See generally Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 89 (1996).

¹²⁵ The exemption legislation of all fifty states and the District of Columbia is collected in 14 COLLIER ON BANKRUPTCY (15th rev. ed. 2001). The exemption provided by these statutes does not, however, apply to creditors to whom the debtor has given a contractual security interest or mortgage in the relevant personal or real property. Thus, secured creditors can often repossess a debtor's most valuable property—cars and homes, which are generally subject to one or more security interests—regardless of whether state law exempts this property. Bankruptcy does not solve this problem, however. See *infra* notes 127-28 and accompanying text.

have stood on the law books since pre-colonial times, and the amount of property exempted by such laws grew rapidly just before and after the Civil War.¹²⁶ Federal bankruptcy law generally does not offer greater current property protection than state exemption laws,¹²⁷ as thirty-five of the fifty states have taken Congress' invitation to impose their own exemption laws on all of their residents, whether or not such debtors seek bankruptcy relief.¹²⁸

Consequently, general creditors are unable to reach the average debtor's property¹²⁹—in debtor-creditor trade lingo, most individual debtors in this country are “judgment proof.”¹³⁰ Indeed, even when creditors can legally seize such property, they usually do not, because the collection and realization costs

¹²⁶ See, e.g., *Edwards v. Kearzey*, 96 U.S. 595, 604 (1877) (holding unconstitutional the new exemption scheme, adopted in the 1868 North Carolina Constitution, due to its “excessive character” and “fatal magnitude”); HOLCOMBE, *supra* note 103, at 17–19, 26, 39, 48–49, 80–81, 94–95, 107–08, 146, 150, 162, 171, 184, 191, 205–06, 210–11, 215, 220, 226, 239, 250, 256, 273, 281, 292–93, 299, 312–13, 330–31, 336; EDWIN JAMES, *THE BANKRUPT LAW OF THE UNITED STATES* 58–62 (New York, Harper & Brothers 1867); WARREN, *supra* note 14, at 88, 110, 181 & n.7; Tabb, *supra* note 4, at 355–56. Exemptions have existed for almost 300 years, since the 1732 English bankruptcy law protected the debtor's “tools of the trade, the necessary household goods and furniture, and necessary wearing apparel of such bankrupt and his wife and children.” Tabb, *supra* note 4, at 341 & n.108 (quoting 5 Geo. 2, c. 30, § 9 (1732) (Eng.)).

¹²⁷ Of central importance to debtors, bankruptcy generally does not overcome the most important limitation of exemption law: A secured creditor's *in rem* right to seize the property securing her claim survives bankruptcy. See, e.g., 11 U.S.C. § 522(c)(2) (2000); *Dewsnup v. Timm*, 502 U.S. 410, 416–17 (1992); *Johnson v. Home State Bank*, 501 U.S. 78, 84 (1991); *In re Penrod*, 50 F.3d 459, 461 (7th Cir. 1995).

¹²⁸ See 11 U.S.C. § 522(d) (2000) (containing a federal exemption scheme, but allowing individual states to “opt out” of the federal scheme and limit their citizens to state exemptions); 14 COLLIER ON BANKRUPTCY Intro.02 n.9 (15th rev. ed. 2001) (listing the thirty-five states that have “opted out”).

¹²⁹ Some creditors used to take advantage of a “loophole” in the exemption law by convincing debtors to “waive” the benefits of the law, subjecting all of their property to the creditor's collection efforts, but the Federal Trade Commission outlawed this practice in 1984. See FTC Credit Practices Rule, 49 Fed. Reg. 7740, 7768–70 (Mar. 1, 1984) (codified at 16 C.F.R. § 444.2(a)(2) (2003)).

¹³⁰ See DOUGLAS G. BAIRD, *ELEMENTS OF BANKRUPTCY* 33 (3d ed. 2001) (“All the debtor's other property consists of items such as clothes and household goods that are exempt from creditor levy.”); LoPucki, *supra* note 124, at 4 & n.4, 89 (defining a debtor as being “judgment proof” when the debtor “has no wealth or holds its wealth in forms not subject to legal process for collection,” for example, property shielded from collection actions by state property exemption law, and noting that, “[a]mong individuals and small firms, [such laws] already protect the vast bulk of all assets against liability,” or at least “close enough”); James J. White, *Corporate Judgment Proofing: A Response to Lynn LoPucki's The Death of Liability*, 107 YALE L.J. 1363, 1367 (1998) (agreeing with LoPucki that “[m]ost individuals have always been judgment proof”).

generally exceed the resale value of most consumer property.¹³¹ Although bankruptcy theoretically allows debtors to acquire property in the future without worrying about creditors seizing it, most individuals who seek bankruptcy relief are not likely to acquire future non-exempt property of sufficient value to attract creditor collection efforts. Thus, while some debtors in some states may seek bankruptcy protection to avoid losing property to creditors, shielding property from creditors is generally not a major benefit of individual bankruptcy.¹³²

Finally, in contrast to concerns about other forms of property, the protection of unpaid wages—one of the most important property interests of the average individual debtor¹³³—is perhaps *the* primary substantive goal of individual bankruptcy today.¹³⁴ Unlike personal property, unpaid wages have not always enjoyed protection outside of bankruptcy. Even now they are protected only partially—and often insufficiently to offer peace of mind to the multitude of people in this country on the bubble between poverty and making ends meet.¹³⁵

States began to limit the amount of unpaid wages that creditors could garnish¹³⁶ from debtors' paychecks in the mid- to late-nineteenth century.¹³⁷ The

¹³¹ See, e.g., CAPLOVITZ, *supra* note 109, at 183–84; SULLIVAN, WARREN & WESTBROOK, *supra* note 1, at 305; *Consumer Bankruptcy Testimony*, *supra* note 63, at 188 (“The vast majority of debts which are discharged in bankruptcy would have been written off [because the creditors had no interest in attempting to collect] if no bankruptcy had intervened.”).

¹³² See REPORT OF THE COMM. ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. 1, at 65 (1973).

¹³³ For the great bulk of people filing for individual bankruptcy, future wages “constitute [their] principal free asset, without the regular receipt of which [they] would be unable to maintain [themselves] and [their families].” Melvin G. Shimm, *The Impact of State Law on Bankruptcy*, 20 DUKE L.J. 879, 897 (1971); see also Hallinan, *supra* note 26, at 75–76; Tabb, *supra* note 3, at 8.

¹³⁴ See, e.g., BAIRD, *supra* note 130, at 33 (“The effect of bankruptcy law is to . . . insulate all the debtor’s future income from creditors . . .”); Hallinan, *supra* note 26, at 147 (“[T]he most important impact of the freedom from personal liability effected by the discharge is the prevention of collection efforts against future income or the fruits of future income . . .”); Susan D. Kovac, *Judgment-Proof Debtors in Bankruptcy*, 65 AM. BANKR. L.J. 675, 751 (1991) (noting that bankruptcy was necessary for many debtors, though “judgment-proof” at the time of filing, only because they “anticipated garnishment of future wages”).

¹³⁵ See, e.g., Kovac, *supra* note 134, at 703 (noting that some people may be forced into bankruptcy by even a small amount of debt, because garnishment leaves the debtor unable to cover daily living expenses on income remaining after garnishment, despite legal restrictions). See generally BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA (2001).

¹³⁶ “Garnishment” is essentially a procedural device by which a creditor can demand that someone who owes money to the debtor pay at least a portion of that money to the creditor rather than to the debtor. See, e.g., ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE LAW OF DEBTORS AND CREDITORS 81–83 (4th ed. 2001). Most debtors are owed money only by their employers for unpaid wages and by their banks for generally small amounts of money on

states, however, took a puzzling variety of approaches to the problem, some leaving the wage-earner virtually defenseless, some forbidding wage garnishment altogether, and most taking a multitude of middle paths.¹³⁸ But the protection of a certain amount of wages often turned out to offer cold comfort to debtors whose employers were annoyed by the complications of dealing with wage garnishment—as one commentator put it in the 1960s, “[i]t is hardly news that an employee who gets his wages garnished runs a serious risk of being fired.”¹³⁹

Although the adoption in 1968 of the Federal Consumer Credit Protection Act¹⁴⁰ offered some uniform relief from the pressures of wage garnishment,¹⁴¹ that relief remains incomplete.¹⁴² First, the original bill had proposed to prohibit

deposit; therefore, wage garnishment is probably the most common form of garnishment—and the most troublesome—in the context of individual debtors.

¹³⁷ See, e.g., COLEMAN, *supra* note 19, at 263 n.11. By the first decade of the twentieth century, every state had a law of some kind that restricted the garnishment of wages. See LINDLEY D. CLARK, *THE LAW OF THE EMPLOYMENT OF LABOR* 55 (1911).

¹³⁸ See, e.g., Harry Abrahams & Edward S. Feldman, *The Exemption of Wages from Garnishment: Some Comparisons and Comments*, 3 DEPAUL L. REV. 153, 156–63 (1954) (cataloguing the state wage garnishment laws as providing “flat amount,” “flat period,” and “flat rate” exemptions, with and without various limitations, in various states, and noting that “[o]ne is hard put to believe that the head of a family can keep that family together on that amount of money [exempted by the flat-exemption statutes] at this time in our economic milieu”); George Brunn, *Wage Garnishment in California: A Study and Recommendations*, 53 CAL. L. REV. 1214, 1215–27, 1250–53 (1965) (describing a rapidly changing array of approaches, from exempting a fixed dollar amount, to exempting a percentage, to limiting or expanding the exemption in the case of debts for certain purposes (e.g., “common necessities”), to restricting protection to certain types of debtors (e.g., married people and heads of families or those with low annual income)); Shimm, *supra* note 133, at 898–900; Henry R. Snyder, Jr., Note, *Garnishment in Kentucky—Some Defects*, 45 KY. L.J. 322, 329–30 (1956–57) (criticizing the meager protection offered by the Kentucky wage garnishment law, which exempted only a small, flat dollar amount of unpaid wages).

¹³⁹ See, e.g., 15 U.S.C. § 1671(a)(2) (2000) (Congressional finding that garnishment “frequently results in loss of employment by the debtor”); Brunn, *supra* note 138, at 1229. Garnishment proceedings impose annoying bookkeeping complications on employers, which gives them an incentive to dismiss those “whose wages chronically are so tied up.” Shimm, *supra* note 133, at 902 & n.64.

¹⁴⁰ 82 Stat. 146 (1968) (codified at 15 U.S.C. §§ 1601–1692p (2000)).

¹⁴¹ See Consumer Credit Protection Act §§ 301–307, 82 Stat. 162–64 (codified at 15 U.S.C. §§ 1671–1677 (2000)).

¹⁴² In 1984, the Federal Trade Commission deemed another wage-related collection device—the contractual “wage assignment”—an illegal unfair trade practice under all but a few narrow circumstances. See FTC Credit Practices Rule, 49 Fed. Reg. 7740, 7755–61 (Mar. 1, 1984) (codified at 16 C.F.R. § 444.2 (2003)). Several states had also restricted the use of wage assignments, but the FTC created a uniform “floor” of protection in 1984. See *id.* at 7756–57. See generally John T. Hundley, *Assignments of Wages in Illinois: Pitfalls For Employer Businesses*, 14 DEPAUL BUS. L.J. 21 (2001). Like the original wage garnishment proposal, the original wage assignment proposal had prohibited all wage assignments, but the ultimate rule

wage garnishment altogether,¹⁴³ but the act as passed did not go that far. Instead, it instituted a “floor” of protection; that is, it shields from garnishment the greater of (1) seventy-five percent of an employee’s weekly “disposable earnings,”¹⁴⁴ (2) thirty times the federal minimum wage,¹⁴⁵ or (3) a greater amount protected under the debtor’s state’s law.¹⁴⁶ The federal wage garnishment restriction has destroyed the argument that over-indebted individuals “lack any incentive to work,”¹⁴⁷ but a significant portion of wages remains unprotected from the grasping hands of creditors. Second, Congress prohibited employers from firing debtors whose wages had been garnished, but only as a consequence of “one indebtedness.”¹⁴⁸ It left open the possibility of terminating an employee whose wages are garnished more than once—which one presumes would be relatively common.¹⁴⁹

The protection of future wages (and possibly the debtor’s job) appears to be the only generally compelling element of the “rehabilitation” theme in individual bankruptcy today. Not surprisingly, wage garnishment has been continually responsible for a sizeable portion of individual bankruptcy filings.¹⁵⁰ For the overwhelming majority of debtors, bankruptcy plays a very limited role in protecting current property and in returning people to economic productivity—it serves primarily to fill the few gaps left by other debtor-protection legislation, that

permitted certain wage assignments in very limited circumstances. See FTC Credit Practices Rule, 49 Fed. Reg. at 7740–41, 7760–61 (codified at 16 C.F.R. § 444.2(a)(3) (2003)).

¹⁴³ See H.R. REP. NO. 90-1040, at 20 (1967). Indeed, the House had suggested a compromise of limiting garnishable wages to ten percent in excess of \$30, see *id.*, but the Senate would only agree to a bill that raised the amount available to creditors. See H.R. REP. NO. 90-1397, at 31–32 (1968).

¹⁴⁴ “Disposable earnings” is a defined term, including total compensation remaining after deduction of amounts required by law to be withheld. See 15 U.S.C. § 1672(a), (b) (2000).

¹⁴⁵ See 15 U.S.C. § 1673(a) (2000). Smaller percentages of wages are protected from creditors collecting on court-ordered support obligations, for example, child and spousal support, and state and federal tax debts are entirely exempt from the law. See 15 U.S.C. § 1673(b) (2000). Note, however, that bankruptcy generally does not affect such debts, either, as they are excepted from discharge. See 11 U.S.C. § 523(a)(1), (a)(5) (2000).

¹⁴⁶ About half of the states offer wage protection greater than or equal to the federal law. See, e.g., Philip Shuchman & Gerald R. Jantscher, *Effects of the Federal Minimum Exemption from Wage Garnishment on Nonbusiness Bankruptcy Rates*, 77 COM. L.J. 360, 362 tbls.1 & 2 (1972).

¹⁴⁷ *Supra* note 118 (stating “earning capacity is taken away”).

¹⁴⁸ 15 U.S.C. § 1674 (2000).

¹⁴⁹ See, e.g., CAPLOVITZ, *supra* note 109, at 230.

¹⁵⁰ See H.R. REP. NO. 90-1040, at 20–21 (1967) (citing a “clearly established . . . causal connection between harsh garnishment laws and high levels of personal bankruptcies”); CAPLOVITZ, *supra* note 109, at 231 (citing large percentages of debtors who had been subject to wage garnishment); STANLEY & GIRTH, *supra* note 4, at 28–32, 47, 236–41; Brunn, *supra* note 138, at 1234 (“[E]ven collection agencies agree that [garnishments] often trigger bankruptcies whatever the underlying causes . . .”); Shimm, *supra* note 133, at 900–01.

is, to protect one-quarter of future wages from garnishment and possibly to protect certain types of “non-exempt” property.¹⁵¹ If Congress had the political wherewithal simply to do away with wage garnishment altogether, as was recommended in the 1960s, individual bankruptcy would be all but superfluous.¹⁵² But given the system as it stands, Professor Howard’s theory appears to be the most insightful and consistent with the legislative history of the current bankruptcy law: Individual bankruptcy today functions to facilitate future access to credit and return people to the “open credit economy.”¹⁵³

IV. RADICAL REASSESSMENT AND A NEW QUID PRO QUO

The fundamental legal and economic developments described above should leave one much less confident in the sanctity and integrity of the current U.S. approach to discharging the debts of individuals. Individual bankruptcy philosophy balances on quite a slender reed if the primary remaining rationale is to protect future income and readmit overindebted debtors into the open credit economy. Given this important but limited justification for individual debt relief, it seems eminently reasonable to call for a more directed and meaningful quid pro quo in exchange for the discharge of valid debt. This Part challenges us to begin to open our minds to the possibility.

Part IV.A suggests that requiring all debtors to submit some portion of their potential future income to creditors would represent a much more sensible exchange of gains and sacrifices. In addition, it would respond much better to the goals of modern individual debt relief law, and it would send a much more acceptable message about debt relief and financial responsibility to the U.S. public. Part IV.B observes that the factual predicate for mandatory payment plans has been in place for over a century, yet Congress appears blindly to have rejected arguments favoring payment plans. Congress has accepted extremely vulnerable and superficial arguments against requiring consideration of future income in all cases. Perhaps we ought not make such demands of overindebted individuals, but we ought to at least face the meaningful arguments fairly.

¹⁵¹ See, e.g., *Local Loan Co. v. Hunt*, 292 U.S. 234, 243–44 (1934).

¹⁵² Indeed, the focused, meaningful relief offered by abolishing wage garnishment would be far superior to the blunderbuss approach of individual bankruptcy. See, e.g., Theodore Eisenberg, *Bankruptcy Law in Perspective*, 28 UCLA L. REV. 953, 954 (1981) (arguing that “some goals of a bankruptcy law might be more effectively achieved through modification of preexisting nonbankruptcy laws”).

¹⁵³ See Howard, *supra* note 55; cf. TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT* 5, 253 (2000) (asserting that bankruptcy “provide[s] middle-class citizens with] a chance—often a last chance—to retain their middle-class status. . . . The core problem is that people are falling out of the middle class because of overwhelming debts.”).

A. Expediency and Feasibility of Mandatory Payment Plans

The traditional exchange of assets for immediate discharge of debt has proven all but meaningless. The debtor-protection legislation described above¹⁵⁴ has made collection of valuable property from the overwhelming majority of individual debtors an extreme rarity, as graphically demonstrated by the meager returns to creditors in individual bankruptcy cases during the twentieth century.¹⁵⁵ One commentator candidly assessed the current situation as follows:

Since distributions are made to creditors in only about five percent of all liquidation bankruptcies, this trade is a good one indeed for most debtors. The reality is that in most cases debtors give up nothing and yet are released from their debts. Debtors then may enjoy their future earnings free from the claims of their creditors.¹⁵⁶

This is hardly the type of message we should be sending to the public about financial responsibility and a trade-off of burdens for benefits.

A much more meaningful and constructive quid pro quo for debt relief would take into account both the most valuable asset of most individual debtors as well as the purpose of individual debt relief. Because one of the average individual debtor's most valuable "assets" is future earning capacity,¹⁵⁷ it only makes sense to consider that asset when determining the exchange of "property" for remission of debt. Current justifications for individual debt relief fail to explain why all debtors should not *attempt* to use at least *some* small portion of their future income to pay their debts, particularly given the dramatic changes in modern economic and legal conditions discussed above.

In addition, if reintroducing individuals into the open credit economy is the primary goal of individual bankruptcy, the system should enhance that goal by requiring debtors to show that they can deal responsibly with the consequences of open access to credit. Asking debtors to commit to devoting some portion of future income to repaying their debts would evidence the type of real "credit rehabilitation" that the debt relief system is designed to achieve. Otherwise, the system does nothing more than thrust those addicted to debt¹⁵⁸ back into the

¹⁵⁴ See *supra* Part III.C.

¹⁵⁵ See *supra* Part III.A.

¹⁵⁶ See, e.g., Tabb, *supra* note 3, at 6.

¹⁵⁷ See *supra* note 133 and accompanying text.

¹⁵⁸ I do not mean to use this phrase to suggest that overindebtedness is always due to debtor irresponsibility—some debt "addiction" is borne of necessity, and it becomes clear that the debtor has "overdosed" only after circumstances such as job loss, illness, or other unforeseen tragedy upset the debtor's fragile financial situation.

temptation-filled world of incessant credit solicitation.¹⁵⁹ Ultimately, requiring a showing of dedication to repayment would inculcate a responsible attitude toward repayment of debt—both among debtors and among those who might consider becoming debtors.

Accordingly, I propose that it should not be absolute anathema to consider eliminating altogether the option of Chapter 7 “straight bankruptcy” for individuals.¹⁶⁰ All individuals should be able to seek effective relief through a slightly altered version of the present system of Chapter 13 payment plans. Recent U.S. scholarship has proposed the essential elements of such a system,¹⁶¹ and other countries have in fact implemented this approach in recent individual debt relief legislation.¹⁶² As usual, the devil here is in the details, particularly the detail of determining how much of the debtor’s future income should be diverted to creditors and for what length of time. This article does not presume to propose the ideal system of mandatory payment plans. It simply argues that we should consider more seriously how existing academic proposals and non-U.S. legal systems demonstrate that the current U.S. system can be altered relatively mildly to adhere more carefully to modern economic circumstances and the goals of individual debt relief.

In my view, in any such system, the amount to be paid should be determined not by divining the debtor’s future employment situation, but by imposing a sort of statutory wage assignment on actual future receipts. The current U.S. approach of speculating about how much of the debtor’s future income is “disposable” and assuming that this number will remain constant for three to five years¹⁶³ is an

¹⁵⁹ See, e.g., F.H. Buckley, *supra* note 118, at 1087 (reviewing SULLIVAN, WARREN & WESTBROOK, *supra* note 153) (noting that, on average, each U.S. resident received more than forty-one mail solicitations for credit access of one sort or another in 1997).

¹⁶⁰ Discriminating between individuals and non-natural entities in this context raises little cause for concern. Non-natural entities now are not entitled to a discharge of debt in Chapter 7. See 11 U.S.C. § 727(a)(1) (2000). Discharge of debt following liquidation is pointless for business entities, as “liquidation” of such an entity is the immediate precursor to death: winding up and dissolution under state business law. See REPORT OF THE COMM. ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. 1, at 72 (1973). Since individuals cannot be “liquidated,” it is theoretically more consistent to limit the application of Chapter 7 “liquidation” to non-natural entities. See *id.* at 72–73. Individuals should seek relief from debt under a system that fits their ontology; that is, they will continue to exist as economic units following debt relief proceedings.

¹⁶¹ See, e.g., Kenneth N. Klee, *Restructuring Individual Debts*, 71 AM. BANKR. L.J. 431, 436–38 (1997); Michelle J. White, *Why It Pays to File for Bankruptcy: A Critical Look at the Incentives Under U.S. Personal Bankruptcy Law and a Proposal for Change*, 65 U. CHI. L. REV. 685, 710–16 (1998).

¹⁶² See *infra* notes 181–86.

¹⁶³ See 11 U.S.C. § 1325(b) (2000). Although the plan can be modified if circumstances turn out to be different than anticipated, see 11 U.S.C. § 1329 (2000), this is an expensive and inefficient way of dealing with the problem.

obvious failure. This is demonstrated graphically by the widely varying demands made of Chapter 13 plans among various judicial districts¹⁶⁴ and the enormous failure rate of all confirmed plans.¹⁶⁵

Instead, the amount to be paid should be determined by a uniform but flexible formula that allows for an acceptable level of subsistence for all debtors. Whether it be all of the debtor's garnishable income for seven years,¹⁶⁶ twenty-five percent of any net annual income in excess of \$50,000 for four years,¹⁶⁷ or ten percent of gross earnings for three years,¹⁶⁸ a uniform standard is crucial to avoid an elaborate and expensive bureaucratic structure that makes subjective and value-laden determinations of ability to pay.¹⁶⁹ Of course, some means of monitoring would be necessary to ensure that debtors actually pay the appropriate amount of their future income. This obstacle could be overcome, for example, by simple wage order or by allowing creditors to request a denial of discharge if the debtor hides income or refuses to work to produce any income. Expensive and cumbersome tactics like "means testing," though, accomplish both too much and too little for meaningful individual bankruptcy reform.

Another critical element of any proposal for mandatory payment plans in the United States must be liberal allowance of the possibility of no payment over the life of the plan. A dizzyingly diverse and confusing array of statistics has emerged from empirical studies of the amount of debt likely to be paid if mandatory

¹⁶⁴ See, e.g., Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 532, 546-47, 550-51 (1993) (noting that the Bankruptcy Court in San Antonio requires one hundred percent payment, in Cincinnati seventy percent, in Austin twenty-five to thirty-three percent, and in Dayton ten percent). Indeed, this "local legal culture" problem, *see id.* at 556, is, in my view, one of the most troubling aspects of Chapter 13 practice that would be resolved by a commitment to relatively objective payment requirements for all debtors.

¹⁶⁵ See *id.* at 535 (citing failures between thirty-five and eighty percent of confirmed Chapter 13 plans in Austin, Cincinnati, Dayton, and San Antonio); SULLIVAN, WARREN & WESTBROOK, *supra* note 1, at 217 (citing plan failure in approximately seventy percent of Chapter 13 cases).

¹⁶⁶ This is the standard applied in German law. See *infra* notes 183-84 and accompanying text. The German garnishment restrictions appear to be significantly more protective than the American law, however, so I would not favor using "garnishable income" as the standard to be paid to creditors, particularly since harsh garnishment often precipitated the bankruptcy to begin with. See *supra* note 150 and accompanying text.

¹⁶⁷ Professor Klee proposed this standard. See Klee, *supra* note 161, at 437-38. Klee's proposal adds a "disposable" factor to the determination of how much income above \$50,000 should be paid to creditors, but he wisely suggests that "disposable income" be determined using uniform guidelines indexed for inflation. See *id.* at 438.

¹⁶⁸ See White, *supra* note 161, at 712.

¹⁶⁹ See, e.g., Boshkoff, *supra* note 49, at 122-23 & nn.207-22 (noting the troubling variety of value judgments imposed on Chapter 13 debtors in various districts); Elizabeth Warren, *The Bankruptcy Crisis*, 73 IND. L.J. 1079, 1091 (1998).

payment plans were required of all debtors.¹⁷⁰ But all of these studies conclude that many debtors—and perhaps most of them—have no ability at all to make ends meet and pay any portion of their debts, even over a five-year period.¹⁷¹ For such people, a “payment” plan foreseeing no payments unless circumstances change should be an acceptable approach. Debtors should not be required to pay any specific portion of their debts to obtain a discharge—our system should take into account future income (if any) and encourage debtor financial responsibility, not ensure creditor benefits at all costs.

Given the large number of debtors who will be unable to pay, eliminating straight bankruptcy and instituting a sensible mandatory payment plan regime would likely achieve little more than altering the public perspective of individual bankruptcy: Instead of advertising a free discharge to any corner with a \$200 filing fee, our system should encourage and emphasize responsible *attempts* at repayment using *all* available assets. The system would publicly presume that the debtor will pay some portion of debt over, say, five years, unless it turns out that the debtor simply has no available future income.¹⁷² Merely calling on debtors to share income with creditors and subjecting debtors to court and creditor scrutiny over five years would serve to inculcate the financial responsibility that the system seeks to achieve before reintroducing people into the credit economy. And

¹⁷⁰ See, e.g., Judge Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 BYU L. REV. 177, 186–92 (citing several studies, each with different percentages of debtors able to pay and amounts payable); Warren, *supra* note 169, at 1087–1100 (describing the 1981 and 1996 studies by the Credit Research Center claiming first that more than thirty percent of Chapter 7 debtors could pay their debts in full, and later that forty-four percent of Chapter 7 filers could repay 13.7% of their debt over five years); Ernst & Young LLP, *Chapter 7 Bankruptcy Petitioner's Ability to Repay: Additional Evidence from Bankruptcy Petition Files*, Am. Bankr. Inst. (Feb. 1998), at <http://www.abiworld.org/consumer/ernst/ernst.html> (last visited May 29, 2003) (reporting that eight to fourteen percent of Chapter 7 filers in large cities could repay from fifty-five to seventy-two percent of total debt, and noting that these findings corroborated the results of the earlier “Georgetown” study by John M. Barron & Michael E. Staten, which concluded that twenty-five percent of Chapter 7 filers could repay at least thirty percent of their “non-housing debt”). The sheer diversity of these statistics is daunting enough, but the situation is complicated by recriminations and counter-recriminations from each camp attacking the methodology and credibility of the other. See, e.g., Jones & Zywicki, *supra*; Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Rejoinder: Limiting Access to Bankruptcy Discharge*, 1984 WIS. L. REV. 1087. In the end, the statistically impaired non-economist is left wondering whom to believe and how far to believe anyone.

¹⁷¹ The studies cited in the immediately preceding note all agree at least on this.

¹⁷² I admit that this is little more than a statutory means-test. This approach simply makes an across-the-board policy determination that “garnishable income” or some such measure leaves people with sufficient means to continue an acceptable lifestyle. A uniform guideline measured by actual future receipts is, in my view, superior to speculation about subjective future ability to pay.

for a significant number of debtors (perhaps ten to fifteen percent¹⁷³), compulsory payment plans would result in greater payments to creditors,¹⁷⁴ demonstrate the creditworthiness of the debtor making a serious effort to pay, and develop further the debtor's own sense of financial responsibility and pride.

Lest creditors complain that this proposal imposes an insufficient burden on deadbeat debtors,¹⁷⁵ any mandatory payment plan should retain some form of the current Chapter 13 "best interest" test.¹⁷⁶ That is, creditors would be guaranteed what they are already receiving: at least the value of all of the debtor's non-exempt property, which, of course, is generally zero.¹⁷⁷ In addition, the current benefits of Chapter 13¹⁷⁸ might be reduced for those making nominal or zero payments to creditors, but this is by no means necessary. Just as we would demand more of debtors, we might quite fairly expect a greater quid pro quo from creditors (i.e., enhanced debtor rights in Chapter 13) in exchange for elimination of the option of straight bankruptcy.

Two options would remain for debtors in the odd position of having more non-exempt property than they can "buy back" with three to five years of future income: First, the system should allow debtors to give to creditors the proceeds of a public or private sale of non-exempt property. A privately conducted, low-pressure garage sale would be invariably more lucrative than a trustee's auction at a publicly announced fire sale.

Second, for those who really cannot muster enough cash over three to five years to pay the costs of filing and retaining an attorney, we ought to acknowledge that bankruptcy is not the best form of relief for such people. The state and federal debtor protection laws described above protect the property of such "judgment proof" people adequately and other, more focused forms of relief should be developed if we believe that "mercy" calls for relief from creditor calls and other such emotional and psychological burdens of overindebtedness.¹⁷⁹

¹⁷³ This appears to be the generally agreed upon median number of debtors with some ability to repay their debts. *See supra* note 170.

¹⁷⁴ *See, e.g.*, Howard, *supra* note 55, at 1082.

¹⁷⁵ *See, e.g.*, Alvin C. Harrell, *The Consumer Issues Agenda of the National Bankruptcy Review Commission*, 51 CONSUMER FIN. L.Q. 9, 10 (1997) (arguing that Chapter 13 might be too generous for debtors unable to pay significant amounts under a payment plan).

¹⁷⁶ *See* 11 U.S.C. § 1325(a)(4) (2000).

¹⁷⁷ *See supra* Part III.A.

¹⁷⁸ For example, Chapter 13 allows restructuring of secured debt, *see* 11 U.S.C. § 1322(b)(2) (2000), and more debts are discharged in Chapter 13 than in Chapter 7, *see* 11 U.S.C. § 1328(a) (2000).

¹⁷⁹ Incidentally, I personally believe that mercy and sound public policy *do* call for such measures of relief.

Indeed, lawyers should not be allowed to advise such people to scrape together and pay \$300 to \$1000 in fees for bankruptcy relief that they do not need.¹⁸⁰

The United States would not be charting new territory in limiting individuals to debt relief thorough mandatory payment plans. Recently developed consumer debt relief laws outside the United States require payment plans. Just to our north, under Canada's Bankruptcy and Insolvency Act, as modified in 1997, the trustee considers in every case the ability of every individual debtor to pay creditors with future income—and most debtors are now expected to turn over at least a small portion of their future income.¹⁸¹ Europe has also begun to initiate consumer debt relief law, and payment plans play an integral role in each of the new systems.¹⁸² In Germany, for example, as of January 1, 1999, every individual debtor seeking relief from debt will have to turn over all non-exempt property as well as all garnishable income for seven years, during which time the debtor must "make every effort to hold or to accept adequate employment."¹⁸³ In France, discharge of debt has only recently become available, but under extremely limited

¹⁸⁰ See, e.g., Briskman et al., *supra* note 60, at 32 (arguing that "more poor people are ripped off by filing bankruptcy when they shouldn't" and opining that debtors discharging \$1000 to \$2000 in debt "have wasted their time and effort" and have been "foolishly advised by friends and family"). Lawyers have little incentive to advise debtors as to non-bankruptcy alternatives for which the lawyers can collect little if any fees or that would require inordinate amounts of legal work. See, e.g., Kovac, *supra* note 134, at 752 & nn.253–54. In contrast, for relatively little work and an easy payoff, consumer bankruptcy lawyers can collect between \$300 and \$1000 in fees, although individual bankruptcy fees vary considerably among localities. See, e.g., Braucher, *supra* note 164, at 546–47; Briskman et al., *supra* note 60, at 16, 18; William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 AM. BANKR. L.J. 397, 400 (1994). The bankruptcy bar, which developed only after the 1898 Act, has driven the growth of the U.S. bankruptcy system and appears most likely to be behind the resistance to change. See generally DAVID A. SKEEL, JR., *DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* 44–47 (2001); David A. Skeel, Jr., *The Genius of the 1898 Bankruptcy Act*, 15 BANKR. DEV. J. 321 (1999); David A. Skeel, Jr., *Bankruptcy Lawyers and the Shape of American Bankruptcy Law*, 67 FORDHAM L. REV. 497 (1998).

¹⁸¹ See, e.g., Jacob S. Ziegel, *The Philosophy and Design of Contemporary Consumer Bankruptcy Systems: A Canada-United States Comparison*, 37 OSGOODE HALL L.J. 205, 213–14, 222–28 (1999); Jacob S. Ziegel, *Canada's Phased-In Bankruptcy Law Reform*, 70 AM. BANKR. L.J. 383, 384–85, 400–04 (1996).

¹⁸² See generally Hans Petter Graver, *Consumer Bankruptcy: A Right or a Privilege? The Role of the Courts in Establishing Moral Standards of Economic Conduct*, 20 J. CONSUMER POL'Y 161 (1997) (describing the Norwegian mandatory payment plan system); Niemi-Kiesiläinen, *supra* note 91 (noting that all of the European systems require a three to seven year payment plan for all consumer debtors).

¹⁸³ Sections 850 to 850i of the German Code of Civil Procedure offer complex and substantial protection against wage garnishment, subjecting relatively little "garnishable income" of the average individual debtor to be ceded to creditors during this seven year period. See GERMAN COMMERCIAL CODE & CODE OF CIVIL PROCEDURE, IN ENGLISH 418–24 (Charles E. Stewart trans., 2001); see also Paulus, *supra* note 91, at 141, 153.

circumstances—and only after a demonstration of complete inability to pay.¹⁸⁴ Revisions to the French Consumer Code in the 1990s now offer debt relief to individual debtors, but generally only extensions of payment deadlines and reductions in accruing interest.¹⁸⁵ Individual debtors can receive a discharge of debt only if they have no ability to pay any part of their debts after a waiting period of up to three years.¹⁸⁶

The fact that Canada and Europe have begun to develop systems of consumer debt relief at least raises a serious challenge to the argument that the United States needs a more generous individual bankruptcy system to substitute for the strong social safety net in other countries.¹⁸⁷ Bankruptcy is ill-suited to substitute for general social security legislation, and experience outside the United States shows that generous social security law cannot replace debt relief law either. The U.S. individual bankruptcy system appears to be so much more liberal than other nations' systems due largely to historical inertia: We have been hesitant in the United States to reconsider outdated rationales for extending immediate and unconditional debt relief to individuals.

Our bankruptcy system would enjoy greater internal integrity and would coordinate better with other debtor-creditor law if debtors were called on to demonstrate an effort to pay some portion of their debts before abandoning their obligations at little or no cost to themselves. I agree completely with the empirical evidence that individuals are *not* abusing the bankruptcy system—there are no “hordes of sharpies”¹⁸⁸ seeking to hide assets and escape their debts while continuing to lead a spendthrift lifestyle.¹⁸⁹ All of the statistics seem to admit,¹⁹⁰ though, that some (*not all*) individual debtors are able to repay at least some of their debts¹⁹¹ over time using future income. Even for those unable to pay, it is important to foster a public perception of a system that demands of everyone responsible reaction to the challenges of the open credit economy.

¹⁸⁴ See Huls, *supra* note 91, at 136–37.

¹⁸⁵ See CODE DE LA CONSOMMATION art. L. 331-7 (1999).

¹⁸⁶ See *id.* art. L. 331-7.1 (1999).

¹⁸⁷ See, e.g., Jacob S. Ziegel, *A Canadian Perspective*, 79 TEX. L. REV. 1241, 1256 (2001) (reviewing SULLIVAN, WARREN & WESTBROOK, *supra* note 153).

¹⁸⁸ Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981–1991*, 68 AM. BANKR. L.J. 121, 147 (1994).

¹⁸⁹ See, e.g., *id.* at 126–40 (demonstrating that “the bankruptcy system is used by the people for whom it was intended: those drowning in debt”); Warren, *supra* note 169, at 1084–100; Weiss et al., *supra* note 4, at 418 (analyzing data from all fifty states and the District of Columbia from 1980 to 1992, and concluding that “individuals do not, on average, appear to shield assets strategically from creditors by filing bankruptcy petitions,” as differences in state exemption and garnishment restriction laws do not appear to affect bankruptcy filing rates).

¹⁹⁰ See notes 170 & 173, and accompanying text.

¹⁹¹ And not only the debts that they preferentially reaffirm. See 11 U.S.C. § 524(c) (2000).

B. Counterintuitive Rejection of Payment Plans as a Quid Pro Quo for Debt Relief

Despite the advent of generally steady household income, the debate about requiring debtors to use that future income in exchange for debt relief has been curiously one-sided until very recently. Asking individuals to trade future income for debt relief became a possibility around the turn of the twentieth century. Until the U.S. "industrial revolution" really took hold following the Civil War, steady wage labor was a marginal institution in our largely seasonal, agricultural economy.¹⁹² The average U.S. household economy began to rely on steady, consistent wages, however, in the decades immediately before and after the turn of the twentieth century, particularly after Progressive-era labor regulation began to force large industrial employers to pay higher wages to larger segments of the population.¹⁹³ The growth of this new "asset" set the stage for a new approach to dealing with present and future financial burdens.

The early twentieth century development of widespread dependence on and availability of steady wages led to the only major revision of the 1898 Act dealing with individual bankruptcy: wage-earner reorganizations. The 1938 Chandler Act¹⁹⁴ for the first time allowed individuals to propose a plan to use future income to pay off creditors.¹⁹⁵ But Congress in 1938 did not require individuals to use expected future wages to pay any part of their debts as a quid pro quo for bankruptcy relief. On the contrary, the benefits of such wage-earner payment plans were viewed as a special privilege restricted to those who could muster

¹⁹² See, e.g., FOSTER RHEA DULLES, *LABOR IN AMERICA, A HISTORY* 25, 54–55, 70, 75 (2d rev. ed. 1960); DANIEL JACOBY, *LABORING FOR FREEDOM: A NEW LOOK AT THE HISTORY OF LABOR IN AMERICA* 44–45 (1998); Robert A. Margo & Georgia C. Villaflor, *The Growth of Wages in Antebellum America: New Evidence*, 47 J. ECON. HIST. 873, 880 fig.1, 883, 889 (1987) (describing virtually flat, depressed wage rates for both skilled and unskilled workers between 1820 and 1855 and noting that "[s]ome scholars flatly deny that real wages rose before the Civil War"). See generally Joshua L. Rosenbloom, *Was There a National Labor Market at the End of the Nineteenth Century?: New Evidence on Earnings in Manufacturing*, 56 J. ECON. HIST. 626 (1996) (suggesting that a well-integrated labor market had emerged in most of the United States only in the late 1870s).

¹⁹³ See, e.g., DULLES, *supra* note 192, at 95–98 (describing "phenomenal industrial expansion" between 1865 and 1900, but depressed wages until 1890 due to large numbers of immigrant workers); JACOBY, *supra* note 192, at 84–86; cf. Edith Abbott, *The Wages of Unskilled Labor in the United States 1850–1900*, 13 J. POL. ECON. 321, 359, 363 tbl.X, 365 tbl.XV (1905) (showing that average wages of unskilled labor rose approximately fifty percent between 1850 and 1900).

¹⁹⁴ Act of June 22, 1938, ch. 575, 52 Stat. 840 (1938) (repealed 1978).

¹⁹⁵ See Chandler Act, ch. 575, §§ 601–686, 52 Stat. 930–38.

majority consent of their general unsecured creditors and *complete* agreement by all secured creditors.¹⁹⁶

For reasons that are not clear from the legislative record, serious arguments for mandated payment plans have been glibly brushed aside for decades.¹⁹⁷ During the comprehensive revision of the bankruptcy law in the 1970s, for example, proposals to require payment plans of some debtors in exchange for discharge of debt were rejected virtually out of hand. In its report to Congress,¹⁹⁸ the Commission on the Bankruptcy Laws of the United States generously praised the wage-earner payment plan provisions of the Chandler Act.¹⁹⁹ It also acknowledged that debtors were choosing "straight bankruptcy" even though they could pay at least "a portion if not all" of their debts if they were to propose a plan.²⁰⁰ Nonetheless, the Commission flatly concluded that forcing all debtors at least to attempt a payment plan had "so little prospect for success that it should not be adopted as a feature of the bankruptcy system."²⁰¹

Ignoring any counterarguments, the Commission simply cited three arguments against mandatory payment plans—arguments that wither under the most casual scrutiny. First, the Commission suggested it would be difficult to achieve national uniformity of payment plans.²⁰² The U.S. proposals and the European systems mentioned above²⁰³ show that non-uniformity could be easily limited by more sensitive drafting of standards. For example, the amount to be paid under the plan could be tied to relatively stable guidelines, such as garnishable income, and the length of the plan could obviously be fixed, as it now

¹⁹⁶ See *id.* §§ 651–652, 52 Stat. 934; H.R. REP. NO. 75-1409, at 53–54, 141 (1937) (explaining that wage earner plans were developed to allow working people to "secur[e] a satisfactory arrangement for payment" and at the same time to "avoid the 'stigma' of bankruptcy," but requiring in sections 651 and 652 that such plans must be "accepted in writing" by *all* secured creditors and a majority in number and dollar amount of unsecured claimants). Curiously, the Chandler Act also limited wage-earner relief to those earning no more than \$3600 per year. See *id.* at 139 (section 606(8)). That limitation was later raised to \$5000 and then removed altogether in 1950. See REPORT OF THE COMM. ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. REP. NO. 93-137, pt. 1, at 164 (1973).

¹⁹⁷ For discussion of earlier proposals to move toward mandatory payment plans, see, for example, Boshkoff, *supra* note 49, at 113–14 (describing attempts in 1932 and 1965 to limit the free and immediate discharge), and William K. Adam, Comment, *Should Chapter XIII Bankruptcy Be Involuntary?*, 44 TEX. L. REV. 533, 541–43 (1966).

¹⁹⁸ See H.R. DOC. NO. 93-137, pt. 1, at 157–67. The portion of the Commission report discussing mandatory payment plans was accepted and excerpted verbatim in the report of the House of Representatives virtually without comment. See H.R. REP. NO. 95-595, at 120–21 (1977).

¹⁹⁹ See H.R. DOC. NO. 93-137, pt. 1, at 157.

²⁰⁰ See *id.*

²⁰¹ See *id.* at 159.

²⁰² See *id.* at 158.

²⁰³ See *supra* notes 160–69, 181–86, and accompanying text.

is between three and five years.²⁰⁴ Moreover, lack of uniformity is prevalent in every area of federal law dealt with by hundreds of courts spread across the country. While uniformity is desirable, inability to achieve it hardly justifies failing to address fundamental issues of philosophy and integrity of the bankruptcy system.

Second, the Commission and the House feared that debtors forced into payment plans would lack the necessary determination to “live within the constraints imposed by the plan.”²⁰⁵ Consequently, mandatory payment plans were feared to be destined to failure and “almost bound to encourage the debtor to change employment.”²⁰⁶ Once again, careful drafting could deal quite effectively with the problem of debtor motivation to earn a living—debtors who failed to uphold their part of the debt relief bargain would simply be denied a discharge.²⁰⁷ The act of filing a bankruptcy petition itself would be a clear sign of dedication to a reasonable payment plan if “straight bankruptcy” were not an alternative. Encouraging debtors to maintain employment and make every effort to make a payment plan succeed is simply a matter of perspective: The discharge can and should be a benefit earned by responsible participation in the open credit economy, rather than an unquestioned erasure of validly incurred debt in exchange for no attempt at repayment at all. If responsible effort is lacking, the discharge could be denied. And if we are to accept evidence that debtors are not currently abusing the system to avoid paying creditors when they are able (which I firmly believe),²⁰⁸ then we should give debtors the benefit of the doubt that they will not actively evade their responsibility under a payment plan.

Finally, the Commission raised the novel theory that requiring payment plans as a prerequisite to individual bankruptcy relief would be tantamount to “debt peonage,” which had been outlawed along with slavery with the Thirteenth Amendment.²⁰⁹ The House raised the debt peonage argument in its proper

²⁰⁴ See 11 U.S.C. § 1322(d) (2000).

²⁰⁵ See H.R. DOC. NO. 93-137, pt. 1, at 159.

²⁰⁶ See *id.*; H.R. REP. NO. 95-595, at 120–21. In addition, the Commission raised the specter of the debtor being forced “to move to another area to escape the importuning calls and correspondence of his creditors.” H.R. DOC. NO. 93-137, pt. 1, at 159 (1973). But the importuning calls and correspondence are dealt with by the automatic stay—the linchpin of bankruptcy relief. See 11 U.S.C. § 362 (2000). Creditors are prohibited from continuing this sort of harassment before a plan is confirmed, and the plan can and should deal with post-confirmation contacts. This is simply a straw argument, which deepens my uncomfortable feeling that the Commission’s glib rejection of mandatory payment plans had been predetermined at the outset.

²⁰⁷ Again, this is how Germany does it. See *supra* note 183, and accompanying text. If excessive court discretion and “local legal culture” is the problem, this can be dealt with through more restrictive legislative drafting. Once again, the point is simply that such problems can be overcome relatively easily.

²⁰⁸ See *supra* note 189.

²⁰⁹ See H.R. DOC. NO. 93-137, pt. 1, at 159.

context—*involuntary* bankruptcy.²¹⁰ Forcing a debtor into bankruptcy *and* imposing a payment plan does indeed smack of debt peonage. But the Commission made this same argument in the very different context of *voluntary* bankruptcy. Requiring a debtor to propose a payment plan over three to five years²¹¹ in exchange for a voluntarily requested benefit—the discharge of unpaid debts—simply does not implicate the Thirteenth Amendment or debt peonage at all.²¹² This is a simple condition on receiving a valuable and completely optional privilege.²¹³ None of the Commission's hesitations with respect to mandatory payment plans withstands reasonable counterargument. Despite its support for voluntary wage earner plans, the Commission failed to articulate a philosophically sound basis for ignoring the debtor's most valuable asset in structuring all individual debt relief.

Requiring payment plans for all individuals would indeed be a radical departure from U.S. bankruptcy history,²¹⁴ but the discussion above²¹⁵ shows that economic conditions and debtor-protection law have also departed radically from their historical antecedents. Setting aside the ambivalent legislative record and simplistic straw arguments about uniformity and incentive, we must ask ourselves today why requiring all individuals to attempt a payment plan is so distasteful.²¹⁶ Modern debtor-protection law and the role of wages and other steady income in the average household economy undermine the intense resistance to any mandatory payment plan regime.

V. CONCLUSION

U.S. bankruptcy law has offered debtors a simple and virtually painless path to freedom from debt since 1898. Since that time, however, “the decades following the adoption of the [1898] Act witnessed a substantial erosion in the

²¹⁰ See H.R. REP. NO. 95-595, at 120 (1977).

²¹¹ The House pointed out that pre-1978 wage earner plans had sometimes stretched on for seven to ten years, which, even I admit, begins to implicate the indentured servitude argument. See *id.* at 117. But Congress dealt with this problem in the current Bankruptcy Code by limiting plans to five years maximum, thus depriving the Thirteenth Amendment debt peonage argument of any substance. See 11 U.S.C. § 1322(d) (2000).

²¹² See, e.g., R. Glen Ayers, Jr., *Reforming the Reform Act: Should the Bankruptcy Reform Act of 1978 Be Amended to Limit the Availability of Discharges to Consumers?*, 17 NEW ENG. L. REV. 719, 726 & n.43 (1982); Eisenberg, *supra* note 152, at 988–89; Klee, *supra* note 161, at 447–49 & n.28 (“There is no serious argument that [requiring payment plans] violates the Thirteenth Amendment.”).

²¹³ See, e.g., Eisenberg, *supra* note 152, at 989.

²¹⁴ See Ayers, *supra* note 212, at 721–23; Martin, *supra* note 59, at 453.

²¹⁵ See *supra* Parts III.B, III.C, IV.A.

²¹⁶ See, e.g., BAIRD, *supra* note 130, at 40 (“Denial of a right to a straight discharge of debts in Chapter 7 does not necessarily lead to catastrophe.”).

accuracy and persuasive force of some of the assumptions upon which the Act was based.”²¹⁷ As a consequence of this erosion, rationales for the individual discharge in the twentieth century were reduced to “a series of vague and essentially meaningless phrases (‘fresh start,’ ‘honest but unfortunate’) that were recited more as preambles than as premises in determination of the proper scope and effect of the discharge.”²¹⁸ Changing economic and legal circumstances strongly undercut the foundations of the three themes rationalizing the individual discharge.

Just because individuals owe a lot of debt does not invariably mean that society should free them from that debt. Our contract regime relies on the assumption that agreements can and will be enforced even if they require some measure of sacrifice on the part of the debtor. If we continue to function under a system that allows individuals to undermine contracts virtually at will, we should realize that we are making a very serious policy decision—instituting public insurance for consumer over-indebtedness.²¹⁹ This may be a desirable and necessary element of a sometimes oppressively capitalist society, but not necessarily. Debtors find sanctuary from their creditors in a number of state and federal laws, as well as in the absence of remedies against the debtor’s personal freedom. The ramifications of over-indebtedness just are not what they were 100 years ago, but our individual bankruptcy policy rests largely on outdated rationales. The limited remaining substance of current rationales does not make a particularly strong case for free discharge with essentially no sacrifice on the debtor’s part.

The revolutionary introduction of voluntary individual bankruptcy relief in the 1841 Act made compelling sense *at that time*. In the early- to mid-nineteenth century, arguments about allowing debtors to return to being productive members of society meant something—one could not be productive from behind the bars of debtors’ prison, and one indeed had little incentive to be productive if most personal property and most or all earnings were subject to seizure by creditors. But despite significant developments in other debtor-creditor laws, the wisdom—let alone the necessity—of the freely available, unconditional individual discharge was simply not reexamined critically when bankruptcy legislation was reenacted in 1867 and 1898. Legislators already took for granted that bankruptcy ought to offer individuals a free and immediate discharge of debt.

But at the turn of the twentieth century, and especially by the time Congress overhauled the bankruptcy law in 1978, the legal and economic landscape had changed dramatically for individual debtors. By the first decades of the twentieth century, individual entrepreneurs could shield themselves from many business-related liabilities simply by complying with the paperwork requirements of state

²¹⁷ Hallinan, *supra* note 26, at 65.

²¹⁸ *Id.* at 69.

²¹⁹ See, e.g., BAIRD, *supra* note 130, at 35; Hallinan, *supra* note 26, at 104–05.

business corporation laws. All debtors were safe from interference with personal liberty, as debt slavery, debtor's prison, and debt peonage had been relegated to distant memory. Finally, larger and larger amounts of debtors' property stood behind the protective shield of exemption statutes and wage garnishment restriction laws, allowing most debtors to disregard the largely empty threats of their creditors. Under such dramatically changed circumstances, the rhetorical image of the individual debtor "overwhelmingly burdened by crushing debt" retained only a sliver of substance.²²⁰

The death of "consumer bankruptcy" need not cause tremendous concern for our debt relief system generally or for particular individuals overwhelmed by debt. If we structure the system to continue to accept the reality that many debtors will not be able to pay, requiring consideration of future income in every case would alter the substance of our current system very little. Theoretically and philosophically, though, such a change would ensure greater internal and external legal integrity. It would take into account the real substance of rationales for the individual discharge as well as the historical evolution of individual economics and debtor-protection legislation. The dead are well.²²¹

²²⁰ Moreover, the growth of the list of nondischargeable debts renders suspect the law's dedication to the "overwhelmingly overburdened debtor." The bankruptcy law excepts a multitude of relatively common debts from discharge in bankruptcy no matter how "overwhelming" and "crushing" they might be for the debtor. See 11 U.S.C. § 523(a) (2000).

²²¹ WILLIAM SHAKESPEARE, *ANTONY & CLEOPATRA* act 2, sc. 4.